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#DefendTheSacred

Harnessing Hard and Soft Law Mechanisms to Integrate International Investment and Cultural Rights

Mota, Ana Rita Carreira Agostinho

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#DefendTheSacred:

**Harnessing Hard and Soft Law Mechanisms to Integrate
International Investment and Cultural Rights**

Ana Rita Mota



The Dickson Poon

School of Law

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**Harnessing Hard and Soft Law Mechanisms to Integrate
International Investment and Cultural Rights**

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Abstract

This research focuses on the relationship between international investment and cultural rights, ultimately seeking to determine how to reconcile investor protection with the need to protect and promote the cultural rights of vulnerable stakeholders, such as indigenous peoples. Cultural rights, which are closely connected to the principles of human dignity and sustainable development, have attracted the attention of academics and policy-makers in recent decades, but are still far from receiving the attention and recognition that they deserve. Conversely, international investment law is much more developed and has been construed in a way that can compromise a host State's ability to regulate in order to promote and protect human rights in general, and cultural rights in particular. This research will contain two parts: the first one will be composed of three chapters, the first analysing the concept and scope of cultural rights; the second providing an overview of international investment law; and the third assessing its relationship with cultural rights. The second part of the study will deal with the hard and soft law mechanisms that can be used to influence the balance between investment and the respect for cultural rights, at the international level. This will include the analysis of voluntary corporate conduct codes (chapter 4), compliance requirements in the context of investment loans (chapter 5), as well as investor-State dispute settlement (chapter 6). Finally, conclusions will be drawn, so as to provide a deeper understanding of the most effective ways to protect and promote cultural rights in the context of foreign investment.

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Abbreviations

AB	Appellate Body
ACHR	American Convention on Human Rights
AfDB	African Development Bank
AP	Action Plan
BIT	Bilateral Investment Treaty
CAO	Compliance Advisor/Ombudsman
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEO	Chief Executive Officer
CERD	Convention on the Elimination of All Forms of Racial Discrimination
COE	Communication on Engagement
COP	Communication on Progress
CRC	Convention on the Rights of the Child
DCF	Discounted Cash Flow
DRD	Declaration on the Right to Development
DSB	Dispute Settlement Body
ECHR	European Convention on Human Rights
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EHS	Environmental, Health and Safety
EIB	European Investment Bank
EITI	Extractive Industries Transparency Initiative
EP	Equator Principles
EPA	Economic Partnership Agreement
EPFI	Equator Principles Financial Institution
ESC	Economic, Social and Cultural (rights)
ESIA	Environmental and Social Impact Assessment
ESMP	Environmental and Social Management Plan
ESMS	Environmental and Social Management System
EU	European Union
FDI	Foreign Direct Investment

FET	Fair and Equitable Treatment
FIPA	Foreign Investment Protection Agreement
FPIC	Free, Prior and Informed Consent
FPS	Full Protection and Security
FTA	Free Trade Agreement
FTC	Free Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GBI	Global Business Initiative on Human Rights
GRI	Global Reporting Initiative
HRC	Human Rights Council
HRL	Human Rights Law
IACtHR	Inter-American Court of Human Rights
IADB	Inter-American Development Bank
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHC	UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage
ICJ	International Court of Justice
ICP	Informed Consultation and Participation
ICSID	International Centre for the Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation
IIA	International Investment Agreement
IIL	International Investment Law
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IsDB	Islamic Development Bank
MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agency

MNE	Multinational Enterprise
MSI	Multi-stakeholder Initiative
NAFTA	North American Free Trade Agreement
NBIM	Norwegian Bank Investment Management
NCP	National Contact Point
NGO	Non-Governmental Organisation
NT	National Treatment
OHCHR	Office of the UN High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice
POSCO	Pohang Iron and Steel Enterprise
PS	Performance Standard
SDGs	Sustainable Development Goals
SPE	Special Purpose Entity
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIMS	Agreement on Trade-Related Investment Measures
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNEP FI	UNEP Finance Initiative
UNESCO	UN Educational, Scientific and Cultural Organisation
UNGC	UN Global Compact
UNIDO	United Nations Industrial Development Organization
UNODC	United Nations Office on Drugs and Crime
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WHC	UNESCO World Heritage Convention
WTO	World Trade Organization

Introduction

1. Background

In the past decades, the whole world has witnessed and praised the undeniably vast array of benefits brought about by foreign investment, particularly in terms of economic growth.¹ Nevertheless, scholars, activists and the media have all highlighted the dangers of globalisation and the transformative effect that it has on societies all over the world, at every level.² In fact, the benefits attributed to increasing investment flows are not always homogeneously distributed among all the groups that are impacted by foreign investment, and claims of insufficient consideration for certain non-economic interests have started to appear and spread all over the world.³ One such interest – the one which constitutes the object of this research – is the protection of the cultural rights of stakeholders that are affected by investment projects,⁴ both as a legitimate non-investment objective that States ought to be able to pursue and, more importantly, as an obligation that, in a perfect world, large and powerful multinational enterprises (hereinafter, MNEs)⁵ ought to have.

On the one hand, the exercise of a given State's sovereign powers seriously risks being constrained by the assumption of commitments at the international level which focus solely on economic issues. On the other hand, and perhaps more worryingly, host States often fail to control the activities of MNEs operating in their territories, sometimes even colluding with them in serious human rights violations.

¹ Especially in the context of developed economies, but depending on absorptive capacities – see Laura Alfaro et al., 'Does foreign direct investment promote growth? Exploring the role of financial markets on linkages', 91 *Journal of Development Economics* 242 (2010).

² For an interesting perspective on the effects of globalisation on democracy, see Armin Von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', 15 *European Journal of International Law* 885 (2004). See also Mohsen al Attar and Ciaran Murnane, 'The Place of Capitalism in Pursuit of Human Rights in Globalized Relationships of States' in Jeffery F. Addicott et al. (eds), *Globalization, International Law, and Human Rights* (Oxford 2011).

³ In this regard, see, *inter alia*, Lorenzo Cotula, *Human Rights, Natural Resources and Investment Law in a Globalised World - Shades of grey in the shadow of the law* (Routledge 2012).

⁴ Throughout this dissertation, and unless otherwise stated, I will refer to 'stakeholders' as not including the foreign investor, but rather as encompassing individuals and communities who are affected by an investment project in which they do not directly participate.

⁵ There is no terminological consensus regarding MNEs; they are also called multinational corporations (MNCs) and transnational corporations (TCs). In this research, I will give preference to the term MNE.

Balancing cultural rights and investment protection raises questions that are likely to grow exponentially in the near future, both in terms of complexity and gravity. Year after year, an increasingly high number of International Investment Agreements⁶ (IIAs) are being concluded,⁷ thus progressively heightening the potential for conflicts of interests between the protection of foreign investment and compliance with other obligations, arising either from domestic or international law.⁸ These conflicts of interests become particularly acute when they involve a non-economic policy objective of the host State, such as the protection of human rights and the environment, as the sovereign prerogative of a State to regulate must be weighed against the duty to protect foreign investors.

IIAs entail the assumption of commitments by the contracting parties regarding each other's investors and investments. They also provide for enforcement instruments,⁹ which generally include the possibility of settling disputes through investor-State arbitration. This means that host States may see their regulatory space constricted (or harder to manage), since they are obliged to compensate foreign investors in case of direct or indirect expropriation and to treat them in a non-discriminatory manner, in accordance with objective and subjective standards of treatment. The violation of these obligations results in host State liability, which, in turn, may lead to a 'race-to-the-bottom',¹⁰ where the will to attract foreign investment dissuades the State from enacting legitimate regulatory measures and eventually leads to a general lowering of standards regarding non-economic objectives.¹¹ Whilst not all disputes between foreign investors and States end up being solved through arbitration, the mere existence of that possibility is regarded as a factor sufficiently strong to influence the

⁶ In this research, IIAs will be deemed to include international investment agreements and international trade agreements, as long as they contain investment-related provisions.

⁷ According to the United Nations Conference on Trade and Development (UNCTAD), by the end of 2014, there were 2,926 Bilateral Investment Treaties (hereinafter, BITs) and 345 other IIAs, including free trade agreements with investment chapters. The UNCTAD points out, nevertheless, that 'the annual number of "other IIAs" has remained stable over the past few years, while the annual number of BITs continues to decline' – UNCTAD, World Investment Report 2015: Reforming International Investment Governance (UNCTAD/WIR/2015) (2015), p. 106.

⁸ The number of investor-State dispute settlement cases has been rising exponentially, reaching unprecedented numbers in 2013 (59 known cases, whilst in 2014 there were 42) – UNCTAD (2015), p. 112.

⁹ Jeswald W. Salacuse, *'The Emerging Global Regime for Investment'*, 51 Harvard International Law Journal (2010).

¹⁰ OHCHR, Human rights, trade and investment report of the High Commissioner for Human Rights (E/CN.4/Sub.2/2003/9) (2003), p. 11.

¹¹ See Kate M. Supnik, *'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law'*, 59 Duke Law Journal (2009), at 373. See also Shannon Lindsey Blanton and Robert G. Blanton, *'What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment'*, 69 The Journal of Politics (2007), p. 144.

way in which States manage their domestic and international obligations, namely regarding human rights. The prominence of the subject has been acknowledged and addressed by both international institutions and legal scholars. Namely, it led several international organisations to emphasise and try to tackle the issue of consistency between IIAs and international human rights instruments. Based on the premise that States have a duty to protect, respect and fulfil human rights, the United Nations (hereinafter, UN) embarked on a mission to establish mechanisms designed to ensure said consistency. In 2003, the High Commissioner for Human Rights affirmed:

(...) it will be important to avoid a situation where the threat of litigation on the basis of broadly interpreted expropriation provisions has a “chilling effect” on government regulatory capacity, conditioning State action to promote human rights and a healthy environment by the commercial concerns of foreign investors. While human rights should not provide a shield to protect unwarranted protectionism, administrative failures or unfair treatment, neither should they be made subject solely to an economic calculus.¹²

Next to the mere existence of the possibility of arbitration, the legal uncertainty created by inconsistent awards is another relevant factor leading to the referred ‘chilling effect’. In the absence of a comprehensive multilateral investment treaty and, consequently, of a centralised dispute settlement mechanism, inconsistent interpretation of similar treaty provisions and unpredictable application of other international law instruments render the parties less willing to take risks – there is ‘a patchwork of mechanisms to resolve the investment disputes’¹³ and no single entity capable of a higher level of judicial review or correction of legal errors made by arbitral tribunals. This results in a very accentuated threat to the rule of law and, therefore, to the legitimacy of the entire investment arbitration system.¹⁴

Whilst some IIAs already contain limited exceptions addressing public policy issues,¹⁵ such as ‘human, animal or plant life or health’ and the protection of ‘aboriginal people

¹² OHCHR (2003), pp. 21-22.

¹³ Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’, 73 Fordham Law Review (2005), p. 1523.

¹⁴ *Idem*, pp. 1582 et seq., affirming that the ‘chilling effect’ on State exercise of regulatory power is but one of the many symptoms of the growing inability to ‘determine with certainty the respective rights and obligations of investors and Sovereigns in a given situation.’

¹⁵ For instance, the 2004 Canadian Foreign Investment Protection Agreement (FIPA) contains broadly drafted general exceptions, which are very similar to those present in the General Agreement on Tariffs and Trade (GATT).

or socially or economically disadvantaged individuals or groups',¹⁶ these exceptions are generally qualified so as to be inapplicable to the agreements' provisions on expropriation or to apply only to Most Favoured Nation (MFN) and National Treatment (NT) standards.¹⁷ This, coupled with the scarcity of customary international law rules dealing with public policy and public interest, renders the consideration of non-economic objectives by international investment tribunals very difficult. In addition, such consideration is deemed a 'dangerous task because it seems to draw tribunals beyond the applicable law and, thus, to expose their awards to a serious danger of annulment.'¹⁸

Despite all the less optimistic views expressed in legal literature in this regard, some authors still affirm that arbitral tribunals seek coherence and, therefore, attempt to reach a consistent interpretation of similar treaty provisions.¹⁹ Furthermore, some commentators stress the fact that:

*(...) consistency should not be confused with uniformity in a world of differing State interests and differing treaty language. Given States' varying interests, it has been suggested by some that the system should be an "intelligent" one that provides different solutions for different users of the system, including developing countries who need policy space for their development. It has also been suggested that predictability might be a better term than consistency to capture the goal at issue.*²⁰

In addition, according to the 1969 Vienna Convention on the Law of Treaties (hereinafter, VCLT), international treaties 'shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.²¹ The elements of context, object

¹⁶ See, e.g., Article 24 of the Energy Charter Treaty, signed in Lisbon in December 1994 and in force since April 1998.

¹⁷ See, *inter alia*, Article 7 of the UK Model Agreement on the Promotion and Protection of Investments (2005, with 2006 amendments), reproduced in Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009).

¹⁸ Charles H. Brower II, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2008-2009* (Oxford University Press 2009).

¹⁹ See, *inter alia*, Ernst-Ulrich Petersmann, 'International Rule of Law and Constitutional Justice in International Investment Law and Arbitration', 16 *Indiana Journal of Global Legal Studies* 513 (2009), as well as David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' OECD Working Paper No 2012/3 (2012), available at: http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf.

²⁰ David Gaukrodger and Kathryn Gordon (2012), p. 61 (emphasis added).

²¹ Cf. Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331 (emphasis added).

and purpose may facilitate an interpretation of IIAs that not only provides for more consistency, but also for more flexibility and the ability to take into account objectives that are not strictly related to investment.

First, it is important to note that many IIAs contain references to these objectives both in the provisions concerning exceptions and in the preamble. For instance, the preamble of the North American Free Trade Agreement (NAFTA), which contains an important investment chapter, expressly refers to the objectives of respecting 'environmental protection and conservation', preserving 'flexibility to safeguard the public welfare' and promoting sustainable development.²² Similarly, the preamble of the Energy Charter Treaty (ECT) mentions 'the increasingly urgent need for measures to protect the environment'. IIAs more recently concluded by the European Union (EU) together with its Member States and third countries, such as the Economic Partnership Agreement (EPA) with the CARIFORUM States,²³ contain more sophisticated references to non-investment objectives, by affirming the contracting parties' commitment to 'the respect for human rights, democratic principles and the rule of law', 'internationally agreed development objectives', 'sustainable development' and 'basic labour rights'.²⁴

Secondly, according to the same Article 31(1) of the VCLT, the assessment of 'context' for the purpose of interpretation of treaty provisions must take into account 'any relevant rules of international law applicable in the relations between the parties'.²⁵ This obligation may require investment arbitrators to take into account important international instruments such as, for example, the UN Universal Declaration of Human Rights (UDHR)²⁶ or the 1972 UN Educational, Scientific and Cultural Organisation (UNESCO) Convention Concerning the Protection of the World

²² It should nevertheless be noted that Article 102 of the NAFTA establishes several objectives which are intended to guide interpretation and application of the agreement; the list does not include the non-investment objectives mentioned in the preamble.

²³ Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (2008), OJ L289/I/3, of 20/10/2008. Although this is primarily a trade agreement, it also contains important provisions on investment.

²⁴ Although the number of IIAs containing these provisions is low in absolute terms, it is important to note that language associated with non-investment goals is gaining popularity in more recent agreements. In this sense, see K. Gordon et al., *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* OECD Working Papers on International Investment 2014/01 (2014), p. 10; and Federico Ortino, *Investment treaties, sustainable development and reasonableness review: a case against strict proportionality balancing*, *Leiden Journal of International Law* 71 (2017), p. 80.

²⁵ Cf. Article 31(3)(c) of the Vienna Convention.

²⁶ Proclaimed by the UN General Assembly in Paris (General Assembly Resolution 217 A (III) of 10 December 1948).

Cultural and Natural Heritage (hereinafter, the World Heritage Convention or the WHC).

It is, therefore, possible to affirm, like Brower does, that ‘principles of treaty interpretation provide a starting point for more open and systematic consideration of the public interest pervading investment treaty disputes.’²⁷

A distinct problematic feature of International Investment Law (hereinafter, IIL)²⁸ is that investors are widely protected in IIAs, but mostly left without any specific obligations, which leads to a significant imbalance of power between them and affected stakeholders. The seriousness of this lack of obligations is heightened by the fact that international Human Rights Law (HRL) has still not reached a point where it clearly imposes legally binding obligations on non-State entities, leaving it to States to adopt rules that translate their human rights obligations regarding the conduct of individuals and MNEs; often, this means allowing business to act with impunity.

The above considerations reflect some of the key concerns expressed in recent calls for reform of IIL.²⁹ Whilst radically restructuring this field of law and its enforcement mechanisms is probably a herculean task, unattainable in the nearest future, several *ad hoc* opportunities for change appear on the horizon. At a time when globalisation is becoming so overwhelming, cultural homogenisation rapidly takes place and civil society is fighting harder than ever to be heard, it becomes urgent to bring forth the debate about cultural rights and how they can be articulated with the protection of investors and investment, about corporate human rights responsibility and the suitability of international arbitration for the effective promotion and protection of such rights.

Discussing these issues is not just a theoretical necessity; a brief look at newspapers and social media in 2016 will quickly demonstrate how relevant these matters are at present in practical terms, namely as evidenced by the situation in Standing Rock, North Dakota, United States (US), which has captured the world’s attention and

²⁷ Charles H. Brower II (2009), p. 376.

²⁸ In this research, IIL will be understood as including not only investment treaties (bilateral and multilateral) and trade agreements with investment provisions, but also other instruments that have an impact on foreign investment, such as the relevant international customary law, general principles of law, judicial decisions and soft law instruments.

²⁹ Regarding calls for reform of IIL, in particular of investment arbitration and States’ ‘regulatory space’, see, *inter alia*, Susan D Franck (2005); Kate M. Supnik (2009); Charles N. Brower and Stephan W. Schill, ‘Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law’, 9 Chi J Int’l L 471 (2008); and UNCTAD (2015).

inspired passionate reactions from both sides involved. At stake is the Dakota Access Pipeline, destined to connect southern Illinois and the Bakken and Three Forks production areas in North Dakota, which is currently fiercely opposed by the Standing Rock Sioux tribe, who argue their sacred sites will be destroyed and the quality of their water (essential for drinking but also for their way of life) will be compromised.³⁰ Unfortunately, this situation is not an isolated event. In Canada, for instance, similar protests are taking place regarding a hydro-electric dam that is to be built on indigenous lands in the Peace River Valley, British Columbia. If actually built, this dam will flood over 80km of the Valley, destroying lands that are vital to indigenous hunting and fishing and destroying grave sites.³¹

2. Research questions

In this research, the focus will be placed mainly on the investor itself. Whilst the issue of extraterritorial regulation of the conduct of MNEs abroad by the home State is extremely interesting, it will not be discussed in this dissertation, for reasons of space.³² Furthermore, this research will not discuss the role of the host State (holder of the primary duty to protect human rights against abuse by third parties, including businesses). This duty imposes on host States a positive obligation to exercise due diligence (in the form of appropriate policies, legislation, regulations and adjudication) to ensure that the activities of private parties do not impinge on the enjoyment by individuals and groups, within their jurisdiction, of internationally-guaranteed cultural rights. The main reasons for excluding this topic from the scope of this research are matters of space (the full treatment of the host State duty to protect would constitute a thesis in itself) and also a question of realism: whereas many developed countries already possess robust mechanisms in this regard, there is still a significant number of States that do not. This is particularly acute in the case of indigenous peoples – as noted by the UN,

³⁰ See, *inter alia*, 'Dakota Access pipeline: the who, what and why of the Standing Rock protests', The Guardian, 3 November 2016, available at: <https://www.theguardian.com/us-news/2016/nov/03/north-dakota-access-oil-pipeline-protests-explainer>.

³¹ See, *inter alia*, 'Canada's \$7 Billion Dam Tests the Limits of State Power', The New York Times, 10 December 2016, available at: http://www.nytimes.com/2016/12/10/world/canada/canadas-7-billion-dam-tests-the-limits-of-state-power.html?_r=0.

³² For an interesting account of the matter, see, *inter alia*, Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Case of Extraterritorial Overreach?' DIHR Matters of Concern Human Rights Research Papers No 2016/04 (2016).

[M]ining companies and other extractive corporations tend to have few requirements to consider the environmental or social impact of their activities on indigenous peoples. This is especially the case in southeast Asia and many African countries due to the non-recognition of customary land rights. Even where some legislation protecting indigenous peoples' land rights exists, it is frequently not implemented or is overpowered by conflicting legislation that is designed to attract foreign investment. Whether it is gold mining in Guatemala, nickel extraction in Indonesia, the Chad-Cameroon oil pipeline, or the gas pipeline in Camisea in the Peruvian Amazon, the effects have been devastating on the indigenous peoples whose territories are destroyed by highly polluting technologies and disregard of local communities' right to the environment.³³

Acknowledging the existing shortcomings of the protection afforded by host States, and recognising the need to find more holistic solutions, I therefore propose to focus mainly on the role of the investor, with one exception: when analysing if investment arbitration can be harnessed to protect cultural rights, I will refer to situations in which host States directly or indirectly engage with human rights and/or cultural rights arguments.

The particular focus on indigenous peoples is intentional, due to the severe vulnerability that results from their particular culture, spirituality and minority status. Not only are there many situations in which the home State does not even acknowledge indigenous peoples as such, but the instances of historical abuse also justify particular care with the preservation of their culture. Indigenous peoples are amongst the most sustainable communities in the world, living in symbiosis with the environment. Ensuring that they are allowed to maintain and develop their traditional ways of life is crucial: there should be no further forced assimilation, and cultural diversity must be guaranteed both because of its intrinsic value, and because of its contribution to sustainable development. In fact,

indigenous peoples tend to see globalization as a threat to their territories, their traditions and cultural expressions, their cultures and identities,

³³ UN Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples* (2009), ST/ESA/328, p. 17, available at: http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf

*compelling them to fight harder on a variety of fronts to ensure their cultural survival, as well as to find a new way to assert their rights and autonomy.*³⁴

The 1989 Convention (No. 169) on Indigenous and Tribal Peoples in Independent Countries (hereinafter, ILO Convention no. 169) states that self-identification is the primary criterion in the definition of which peoples should be considered indigenous. It further characterises tribal and indigenous peoples as those groups ‘whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations’. In addition, it refers to indigenous peoples as those groups having a particular status as a result of their ‘descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.’³⁵

The main question that this research intends to answer is: how can we harness both hard and soft law mechanisms to integrate international investment and cultural rights? That is, in order to integrate international investment and cultural rights, is it preferable to harness hard or soft law mechanisms, or a combination of both, and what can be improved?

This may be broken down into several secondary questions, namely: is it possible to address cultural rights concerns in the context of investment projects from an *ex ante* perspective, i.e., before a dispute between the investor and the host State has a chance to occur? Is it realistically possible to influence the behaviour of MNEs so as to guarantee that they will do everything in their power to respect, protect and promote cultural rights? If this is indeed possible, what are the hard and soft law mechanisms that can be harnessed for that purpose? And, lastly, how adequately can investment arbitration deal with cultural rights issues that may arise? Are stakeholders able to participate in the dispute, express their concerns and defend what is sacred to them? What is more effective?

³⁴ UN Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples* (2009), ST/ESA/328, p. 71. See previous page for the arguments leading to this conclusion.

³⁵ See Article 1 of ILO Convention n.º 169.

3. Methodology

The methodology applied to this research is not purely doctrinal, but rather analytical. It entails extensive literature review on the topic and related matters, but also a thorough examination of investment arbitration documents, a survey and analysis of the relevant international hard and soft law instruments, official figures and reports, as well as the media. This research intends to be inter-disciplinary, in the sense of drawing from different branches of international law, namely international investment law, international cultural heritage law and international human rights law, complemented by notions of anthropology and archaeology.

This dissertation revolves, to a great extent, around the phenomenon of globalisation and its impacts on individuals and communities. It draws inspiration from Kant's famous words:

*Since the narrower or wider community of the peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high-flown or exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable for the maintenance of the public human rights and hence also of perpetual peace.*³⁶

The approach undertaken is liberal, principled and human rights-based, recognising cultural diversity and pluralism without losing sight of the universal values and morality that form part of an 'overlapping consensus'³⁷ uniting the whole of humanity. It is cosmopolitan in the sense that it presupposes that 'all kosmopolitês, all citizens of the world, share a membership in one single community, the cosmopolis, which is governed by a universal and egalitarian law.'³⁸ Normatively speaking, this leads to the affirmation of the principle per which 'every human being has a global stature as an ultimate unit of moral concern'.³⁹ In addition, this research follows Buchanan's

³⁶ Immanuel Kant, 'Perpetual Peace: A Philosophical sketch (1795)' in Hans Reiss (ed), *Kant's Political Writings* (Cambridge University Press 1970), pp. 107-108.

³⁷ The expression is borrowed from John Rawls, 'The idea of an overlapping consensus', 7 *Oxford Journal of Legal Studies* 1 (1987).

³⁸ Roland Pierik and Wouter Werner, *Cosmopolitanism in context: perspectives from international law and political theory* (Cambridge University Press 2010), p. 1.

³⁹ Thomas W Pogge, *World poverty and human rights* (Polity 2008), p. 175.

thesis that '[j]ustice ought to be a primary goal of the international legal system, where the main content of justice is supplied by a conception of basic human rights.'⁴⁰

In sum, the three main pillars grounding this research are as follows: first, *every* human being has *equal* moral value and *everyone* has an obligation to contribute to the preservation of such moral value; second, human rights are inherent to a vision of global justice as the ultimate goal of the international legal system; third, cultural rights are essential to sustainable development, to the preservation of the identity of communities and their self-determination, to human dignity and to the promotion of peace amongst and within nations.

4. Main thesis and structure of the work

This research takes it as a given that the integration of international investment and human rights is desirable, and that both human rights and investment are worthy of protection. It assesses if and how this integration may be achieved, through an analysis of the arguments behind the relevant rules and an appraisal of their consequences.

The thesis acknowledges that neither international HRL nor IIL, as they stand today, offer the clarity and accountability necessary to guarantee the protection and promotion of the cultural rights of stakeholders that are affected by investment projects. For that reason, it will demonstrate the need to harness both hard and soft law mechanisms in order to enhance the integration of cultural rights and international investment. This dissertation will assume that prevention of impacts should be preferred, as opposed to remediation, which justifies the harnessing of soft law mechanisms imposing human rights responsibilities on companies and financial institutions (at least, as long as legally binding instruments are not available). Keeping in mind the cases where these impacts cannot be prevented from the point of view of corporate social responsibility, this research will also assess how different approaches to investment arbitration may contribute to the protection and promotion of cultural rights.

⁴⁰ Allen E Buchanan, *Justice, legitimacy, and self-determination: moral foundations for international law* (Oxford University Press on Demand 2007), p. 69.

In light of the above, it is important to map the most relevant hard and soft law instruments, including intergovernmental, institutional and private initiatives, that are applicable to international investors, and to understand how they can be applied in this very specific context through an examination of their key features. I conclude that, if implemented and applied correctly and substantially by investors, existing soft law mechanisms have the potential to significantly affect corporate behaviour so as to bring it into compliance with human rights law. This constitutes a small yet positive step in the right direction, and whilst the international community struggles to adopt binding rules on corporate behaviour, these instruments should be harnessed and their 'hardening' should be promoted.

To clarify, for the purposes of this dissertation, the 'hardening' of soft law instruments is deemed to occur in four different ways: first, States and regional institutions (such as the European Union) may adopt binding legislation inspired by, and in line with, the existing soft law instruments; second, international organisations can make, apply and enforce rules linked to sustainability in an increasingly 'law-like' manner; third, international courts and tribunals may apply human rights standards to corporate behaviour, even if indirectly (e.g., investor-State dispute settlement bodies may justify their decisions with reference to soft law instruments); and, finally, the success of these initiatives can inspire the transition of international human rights law to a binding framework that is more adjusted to a globalised world, in which MNEs hold massive power, through the formal expansion of human rights responsibilities to non-State actors.

In short, the answer that I propose to the main research question (how can we harness both hard and soft law mechanisms to integrate international investment and cultural rights?) is as follows: since none of the individually assessed instruments sufficiently guarantee such integration when taken in isolation, it is essential to make an intelligent and effective use of both hard and soft law mechanisms in combination, which in turn has the potential to significantly alter corporate behaviour and to foster a more sustainable investment culture. Both sets of instruments should be pursued, but they also need to be improved. The answer, therefore, lies not in the strict choice between binding legislation and private orderings, but rather in their coexistence, mutual reinforcement and improvement.

There will be two parts to this dissertation: the first, composed of three chapters, will focus on the conceptual framework, analysing the concept of cultural rights and the

main contours of investment protection, followed by a sketch of the interaction between the two. The reason for the inclusion of these chapters lies fundamentally in the broad range of intended readers (from human rights lawyers to investment lawyers, but also scholars who are interested in the cultural rights responsibilities of business more generally), who may not be familiar with the context of international investment law or cultural rights. The second part, also with three chapters, will analyse both *ex ante* and *ex post* mechanisms to protect cultural rights.⁴¹

Chapter 1 will focus on the conceptual and historical framework of cultural rights, but also on the linkage with related concepts (such as cultural heritage and other related human rights) and the relevant sources of law. Chapter 2 will provide a brief overview of IIL and relevant instruments, whereas chapter 3 will address the relationship between investment and cultural rights, providing an examination of the clashes of interests that are manifest in their interaction.

The second and main part of this research will deal with the legal mechanisms that can be harnessed to influence the balance between investor protection and the respect for cultural rights, at the international level. This will include the analysis of corporate social responsibility (chapter 4), the role that banks may play in corporate performance (chapter 5), as well as investor-State dispute settlement (chapter 6). Chapters 4 and 5 will thus attempt to determine if and how it is possible to influence the behaviour of investors *ex ante*, either through their own volition or through requirements imposed by banks financing investment projects. Chapter 6 will address the last safety net for stakeholders, which is the possibility of addressing cultural rights arguments in investor-State dispute settlement (ISDS). Finally, some conclusions will be drawn and some suggestions will be put forward.

⁴¹ *Ex ante* mechanisms will refer to the tools that can be used mainly before the implementation of the investment project and/or before adverse impacts have a chance to occur, whereas *ex post* mechanisms relate to tools that can be used mainly after project implementation and/or after adverse impacts take place.

PART I

Conceptual Framework

Chapter 1 – The kaleidoscope of cultural rights

1. What is culture?

Cultural rights have, to a large extent and until very recently, been neglected by academics, international organisations and human rights treaty bodies. This is particularly evident when taking into account the prevalence of the mature categories of civil, political, social and economic rights in legal literature, as well as in decisions of international and regional courts and the work of international organisations. In the late nineties, Symonides had already characterised cultural rights as an ‘underdeveloped category’ of human rights and pointed out that ‘[they were] the least developed as far as their scope, legal content and enforceability are concerned’.⁴² This is still a pertinent observation today.⁴³

According to Stamatopoulou, there are generally six reasons for this neglect, namely: (1) fear that discussing cultural rights will raise the issue of cultural relativism,⁴⁴ which can weaken the claim for universality of human rights; (2) the ‘fluid and changing’ nature of the definition of ‘culture’, which is necessary to define cultural rights; (3) the pervasiveness of the view of cultural rights as a ‘luxury’; (4) ‘political difficulties’ arising from the fact that talking about cultural rights will lead to a discussion of ‘cultural wrongs’ – which many governments are still not willing to do; (5) the fear that cultural rights might legitimise cultural groups’ identity claims and compromise the idea of ‘nation-state’; and, finally, (6) institutional shortcomings, such as the fact that ‘the Committee on Economic, Social and Cultural Rights and UNESCO have

⁴² Janusz Symonides, ‘*Cultural rights: a neglected category of human rights*’, 50 *International Social Science Journal* 559 (1998).

⁴³ In this sense, see Athanasios Yupsanis, ‘*The Concept and Categories of Cultural Rights in International Law: Their Broad Sense and the Relevant Clauses of the International Human Rights Treaties*’, 37 *Syracuse Journal of International Law and Commerce* (2010); and Francesco Francioni, ‘Culture, Heritage and Human Rights: An Introduction’ in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers 2008).

⁴⁴ There is a very interesting account of cultural relativism and human rights in Richard A. Wilson, ‘Human Rights, Culture and Context: An Introduction’ in Richard A. Wilson (ed), *Human Rights, Culture & Context - Anthropological Perspectives* (Pluto Press 1997), pp. 4-10.

unfortunately not yet forged the substantive link they were expected to create by the drafters of the International Covenant on Economic, Social and Cultural Rights'.⁴⁵

Whilst a complete analysis of the history of cultural rights is outside the scope of this research,⁴⁶ it is still important to consider in broad terms how the concept of culture evolved throughout time. For this purpose, it is necessary to understand the kaleidoscopic presentation of the concept of culture, as well as the evolution of international practice in terms of 'cultural property', which progressed to today's notion of 'cultural heritage', in turn intimately connected to the idea of cultural rights.

Attempting to define 'culture' is an extremely difficult task, which is not exempt from serious consequences. For a long time, it has been an object of study for a number of disciplines, namely archaeology and anthropology, but it is increasingly important to transport the discussion into the field of international law, as the term becomes more and more pervasive in the legal realm. The term 'culture' or 'cultural' may be so broadly interpreted as 'an all-inclusive, totalizing concept'⁴⁷ that it includes basically any form of human interaction with the surrounding environment. Conversely, it may be construed in such a restrictive way that it risks leaving out a number of important elements, such as those that are private to specific groups. Adding the (more recent) qualification of 'heritage' to the concept of 'culture' may appear to narrow down its scope dramatically, but this is not straightforward. In fact, although 'heritage' seems to hint towards the past and to something handed down from previous generations to the next, and therefore exclude all current affairs, the fast pace at which society develops, grows and changes cannot be ignored, and the 'past' may be anything that happened up to exactly now.

There are, as summarised by Stamatopoulou, three levels of 'culture' which stem from literature and institutional practice:

- a) *culture in its material sense, as product, as the accumulated material heritage of mankind, either as a whole or part of particular human groups, including but not limited to monuments and artifacts (sic);*

⁴⁵ Elsa Stamatopoulou, *Cultural Rights in International Law - Article 27 of the Universal Declaration of Human Rights and Beyond* (Martinus Nijhoff Publishers 2007), pp. 4-6.

⁴⁶ But very clearly explained in, *inter alia*, Elsa Stamatopoulou (2007); and Francesco Francioni and Martin Scheinin (eds.), *Cultural Human Rights* (Martinus Nijhoff Publishers 2008).

⁴⁷ John G. Blair, 'Blackface Minstrels in Cross-Cultural Perspective', 28 *American Studies International* 52 (1990), p. 53.

- b) culture as process of artistic or scientific creation, i.e. the emphasis being placed on the process and on the creator(s) of culture; and
- c) culture in its anthropological sense, i.e. culture as a way of life or, in UNESCO's words, the "set of distinctive spiritual, material, intellectual and emotional features of society or a social group"; it encompasses "in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs".⁴⁸

In the words of Eriksen, 'culture is naturally not a solid object, even if the word unhappily is a noun. Culture is something which happens, not something that merely exists; it unfolds through social process and therefore also inherently changes.'⁴⁹ It is this sense of culture as a way of life that is the most relevant to the current research; nevertheless, it was the last to permeate the legal realm.

2. From 'cultural property' to 'cultural heritage'

The first approaches to the protection of cultural goods to appear in international law refer to the laws of war and to a State-oriented view of tangible culture *as property* deserving special protection – that is, in the first sense of the concept of 'culture' mentioned above. In particular, legal instruments adopted in the late 19th and early 20th centuries provided for the obligation to 'spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes [and] historic monuments' in situations of siege and bombardment, as is the case of the 1907 Hague Convention.⁵⁰ Later on, in 1923, another Hague conference produced rules in similar terms for the purpose of controlling air warfare.⁵¹ However, the protection of cultural

⁴⁸ Elsa Stamatopoulou (2007), p. 109 (references omitted).

⁴⁹ Thomas Hylland Eriksen, 'Multiculturalism, Individualism and Human Rights: Romanticism, the Enlightenment and lessons from Mauritius' in Richard A. Wilson (ed), *Human Rights, Culture & Context - Anthropological Perspectives* (Pluto Press 1997), pp. 53-54.

⁵⁰ See Article 27 of the *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* (1907). The wording of this provision was very similar to the one found in the work of Francis Lieber, the author of the 'Lieber Code', proclaimed by President Lincoln in 1863, in the US, which demonstrates that this type of concern was well known to the realm of national regulation before it reached the international level – *General Orders No. 100 on April 24: The Instructions for the Governance of Armies of the United States in the Field* (1863), available at http://avalon.law.yale.edu/19th_century/lieber.asp.

⁵¹ See Article 25 of the *Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, drafted by a Commission of Jurists at the Hague* (1923), available at <http://www.icrc.org/ihl.nsf/FULL/275>; these rules were never adopted in legally binding form.

property, in these and subsequent conventions, was merely ancillary to the regulation of other subjects.

The first international instrument to focus specifically on the protection of cultural property was a treaty entered into by 21 American States, known as the Roerich Pact.⁵² The contracting parties agreed to create a distinctive flag (the 'Banner of Peace', displaying the 'Pax Cultura' emblem) with the purpose of identifying 'historic monuments, museums, scientific, artistic, educational and cultural institutions'. These monuments and institutions were to be 'considered as neutral and as such respected and protected by belligerents', both in time of peace and in war.⁵³ Although of great historical relevance, the Roerich Pact, not unlike subsequent draft treaties, was quickly left behind, mostly due to 'the events of World War II, (...) changes in the technology, tactics and strategy of warfare and the new concept of "total war," and (...) the offenses against cultural property deliberately and systematically committed by the Nazis'.⁵⁴

Until World War II, the protection of cultural property was seen as belonging to the jurisdiction of each individual State. If someone were to perpetrate acts against cultural property, he would be liable before his own government, even though his acts were against international law. This came to change radically. First of all, the Nuremberg trials reflected very clearly the notion that individuals committing offences to cultural property would incur international responsibility and could therefore be tried by the offended State.⁵⁵ Secondly, with the creation of UNESCO and subsequent conclusion of a number of international treaties relating to cultural property, namely the 1954 Hague Convention,⁵⁶ the principle of individual international responsibility was affirmed and incorporated. The idea that cultural property was only a part of the State was being overcome by the powerful notion that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'.⁵⁷

⁵² *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact)*, Washington (1935), available at <http://www.icrc.org/ihl.nsf/FULL/325?OpenDocument>.

⁵³ See Article 1 of the Roerich Pact.

⁵⁴ John Henry Merryman, 'Two Ways of Thinking About Cultural Property', 80 *The American Journal of International Law* 831 (1986), p. 835.

⁵⁵ See the example of Rosenberg, referred in John Henry Merryman (1986).

⁵⁶ *UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague* (1954), hereinafter referred to as the '1954 Hague Convention'.

⁵⁷ Cf. Preamble of the 1954 Hague Convention.

The 1954 Hague Convention corresponded to a new vision of the world order and to the idea that the protection of cultural property contributed to international peace. That new vision led to the conclusion of various international instruments on cultural property. UNESCO adopted a number of Recommendations on specific issues, such as the 1956 Recommendation on International Principles Applicable to Archaeological Excavations, the 1960 Recommendation concerning the Most Effective Means of Rendering Museums Accessible to Everyone, the 1962 Recommendation concerning the Safeguarding of Beauty and Character of Landscapes and Sites, the 1964 Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, and the 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private works.⁵⁸

In the 1970s and 1980s, a significant number of UNESCO conventions were concluded, considerably contributing to a more precise notion of cultural property and, at the same time, to the evolution of the concept towards a more sophisticated and cosmopolitan construction – that of *cultural heritage*. The World Heritage Convention (WHC), adopted in 1972,⁵⁹ is a landmark in this evolution, postulating a positive interaction between the national and international levels of protection of cultural heritage. This Convention is one of UNESCO's biggest successes – in fact, 193 States Parties have adhered to it, which means near universal acceptance of what it postulates.

The Preamble of the WHC states that 'it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto'. This interaction was patent in the functioning of the Convention: the World Heritage List enumerates the 'properties forming part of the cultural heritage and natural heritage (...) which it considers as having outstanding universal value'.⁶⁰ However, the inclusion of a site in the List depends on the initiative of the State in whose territory the cultural or natural property is located. After nomination, the World Heritage Committee has a final say as to the inscription on the List. Beyond

⁵⁸ All available at:

http://portal.unesco.org/en/ev.php-URL_ID=12026&URL_DO=DO_TOPIC&URL_SECTION=-471.html.

⁵⁹ The text of the WHC is available at: <http://whc.unesco.org/en/conventiontext/>

⁶⁰ Cf. Article 11(2) of the WHC.

question, cultural nationalism was being replaced by a more dynamic perspective, in which pluralism would play an ever more relevant role. Cultural heritage, whilst still within the scope of the sovereign powers of each individual State, acquired a universal dimension, by being regarded as a value deserving protection through the cooperation of all members of the international community.

In fact, 'cultural heritage' as a category expanded immensely during the past four decades. What started off as referring only to material manifestations of culture (normally associated with the concept of 'cultural property'), progressively started to include other elements, such as natural areas and landscapes. Accordingly, the concept of cultural heritage enshrined in the WHC comprises monuments, groups of buildings and sites which, because of their particular features, 'are of outstanding universal value'⁶¹ – however, it still reflects mostly the notion of tangible cultural heritage. The idea of 'heritage' as something that is transmitted from generation to generation because of its special value to the preservation of a given people's identity is very present in the WHC. As Blake emphasises, '[t]his view of cultural heritage lies behind much of the rhetoric of the international law on the subject and reflects a powerful emotional impulse as well as an intellectual position'.⁶²

A further element of cultural heritage that is worth noting lies in the deep connection between nature and culture that has progressively become uncontested. As Lowenthal very expressively points out, 'if [culture and nature] are twins, they are Siamese twins, separated only at high risk of the demise of both'.⁶³ In line with this increasingly popular view, which derives from 'science and sentiment alike',⁶⁴ the WHC establishes a link between the two elements, treating them both as an indispensable part of the world heritage. Nevertheless, at the time the WHC was adopted, in practice there was still a very striking dichotomy between nature and culture, which had consequences at the level of the inscriptions in the World Heritage List. When, in 1992, the Convention was celebrating its 20th anniversary, the World Heritage Committee requested a series of efforts in order to evaluate the performance and achievements of the Convention, identify its weaknesses and propose

⁶¹ The concept of 'outstanding universal value' is a controversial one, but its detailed study is outside the scope of this research. For a good account of the debate, see Craig Forrest (2010), pp. 232-238.

⁶² Janet Blake, 'On Defining the Cultural Heritage', 49 *International & Comparative Law Quarterly* 61 (2000).

⁶³ David Lowenthal, 'Natural and cultural heritage', 11 *International Journal of Heritage Studies* 81 (2005).

⁶⁴ *Idem*, p. 85.

improvements. In the course of that assessment, it became obvious that the World Heritage List contained a number of serious discrepancies, both in terms of geographic location of the sites (more than half of the inscriptions were located in Europe and North America) and of the specific features of the cultural objects (a vast majority of the religious sites on the list were connected to Christianity; defunct civilisations were much more represented than living civilisations). More conspicuously, 78% of the inscriptions corresponded to cultural properties, whilst only 22% referred to natural properties.⁶⁵

These findings, alongside intense criticism from countries which considered that the World Heritage List did not offer enough room to include their particular cultural features, led to the development of the concept of 'cultural landscape'. According to the 2012 Operational Guidelines for the Implementation of the World Heritage Convention, cultural landscapes are 'cultural properties and represent the "combined works of nature and of man" designated in (...) the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.'⁶⁶ This new classification admittedly benefited several countries, by allowing for the inscription of sites of universal value which otherwise would not be recognised. Currently, there are 88 sites on the World Heritage List under the classification of 'cultural landscape'.⁶⁷

The above notwithstanding, the system of the WHC still received harsh criticism both from commentators and representatives of local communities, who accused it of 'elitism' and of neglecting the interests of those communities that constituted groups *within a State*. These communities generally witnessed a neglect of their particular cultural heritage by the State and the international community alike, as can be seen from numerous examples around the world, such as the difficulties encountered by

⁶⁵ Data collected by UNESCO, published in S. Boukhari, *'Beyond the monuments: a living heritage'*, 80 UNESCO sources (1996).

⁶⁶ Cf. Section II.A(47) of the *Operational Guidelines for the Implementation of the World Heritage Convention* (2012), UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, WHC 12/01.

⁶⁷ Data published on the WHC website: <http://whc.unesco.org/en/culturallandscape>.

Australian Aborigine.⁶⁸ Commentators denounce the inability of the WHC, even after the creation of the 'cultural landscapes' category, to balance universalism, on the one hand, and cultural diversity, on the other. More generally, the insufficiencies of the concept of cultural heritage, regarding its suitability to encompass the interests of these groups that are constituted within a State, can be immediately verified at the level of interpretation. Two disparate views of the concept clash and reveal a significant gap.⁶⁹ On the one hand, the theory of cultural internationalism points to an idea of protection of cultural heritage linked to its value to 'mankind as a whole',⁷⁰ and minimises the importance of the protected objects to the preservation of the identity of the people that produced it. On the other hand, the theory of cultural nationalism focuses on the value of cultural heritage to the nation-State from which it originates,⁷¹ and assumes, for instance, that all cultural productions of indigenous peoples belong to the State – which is tantamount to saying that the interests of communities existing within a State are assimilated with those of the majority and stripped of their specificity.

As was pointed out even before the adoption of the WHC, in a meeting at the UNESCO headquarters, one could identify an apparent contradiction between the *right to culture* and the *right of cultures*. 'In the first case, what is involved is the individual's right to culture, a right of which he may be deprived by poverty or by political oppression; in the second, it is the right of cultures to survival in the face of radical changes taking place in the world today. The first of these rights calls for modernization: the second has much to fear from it.'⁷² The evolution of international law seems to have included these apparently contradictory rights under the wings of cultural heritage, mostly through the intensive legislative activity of the UNESCO.

⁶⁸ In this regard, see Athanasios Yupsanis, 'Cultural property aspects in International Law: the case of the (still) inadequate safeguarding of indigenous peoples' (tangible) cultural heritage', 58 Netherlands International Law Review 335 (2011); P. J. Fowler, 'World Heritage Cultural Landscapes 1992-2002', 6 World Heritage Papers (2003); and Jean Musitelli, 'World Heritage, between Universalism and Globalization', 11 International Journal of Cultural Property 323 (2002).

⁶⁹ See Joe Watkins, 'Cultural Nationalists, Internationalists, and "Intra-nationalists": Who's Right and Whose Right?', 12 International Journal of Cultural Property 78 (2005), and Athanasios Yupsanis (2011).

⁷⁰ This expression is used, *inter alia*, in the Preamble of the WHC.

⁷¹ The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property reflects this view, at Article 4(a), stating that '[c]ultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory' 'forms part of the cultural heritage of each State'.

⁷² Red Cross, 'Cultural Rights as Human Rights, UNESCO Chronicle, Paris 1968, No. 12', 9 International Review of the Red Cross (1961 - 1997) 166 (1969), p. 167.

The most significant expansion of the concept of cultural heritage to date is probably the recognition and protection of intangible cultural heritage, such as music, language, ceremonial and ritual traditions and performing arts. This development was controversial, since several States considered intangible cultural heritage to be somehow unimportant (mostly, developed countries),⁷³ whereas for many other cultures there is no possible way of separating the tangible from the intangible. The notion of intangible cultural heritage is very closely linked to cultural identity, cultural diversity and sustainable development,⁷⁴ thus to human dignity and human rights.

It is important to note that the move to intangible cultural heritage took place in the context of heavy criticism of the WHC, especially from Asian, African and South American countries, who deemed it to be 'Eurocentric in composition, but also dominated by monumentally grand and aesthetic sites and places'.⁷⁵ Even the category of 'cultural landscape', added to the WHC system in 1992, was considered to be insufficient to tackle the problem, although it was meant to incorporate elements of intangible cultural heritage. This criticism triggered a serious debate about the nature of cultural heritage, its definition and protection.

UNESCO had a leading role in this development, adopting a number of instruments which were directed at the safeguarding of intangible cultural heritage. It is worth mentioning the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore,⁷⁶ the 1993 Living Human Treasures programme and, more importantly, the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity, implemented in 1998, which 'served as a lever for the creation of the [2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage]⁷⁷ (hereinafter, the ICHC).

⁷³ In the UK, for instance, intangible cultural heritage is neglected, to the point where 'intangibility is marked out as "irrelevant", "difficult" and incomprehensible' and the 'authorised heritage discourse' emphasises 'materiality and physicality' – see Laurajane Smith and Emma Waterton, 'The envy of the world?' - Intangible Heritage in England' in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009).

⁷⁴ See Craig Forrest (2010), pp. 362-363.

⁷⁵ Laurajane Smith and Natsuko Akagawa, 'Introduction' in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009).

⁷⁶ Available at the UNESCO website:

http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁷⁷ Noriko Aikawa-Faure, 'From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage' in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009).

The ICHC,⁷⁸ adopted in 2003 and in force since 2006, attracted a surprising level of support, counting today with 172 States parties. After lengthy discussions about the meaning of intangible cultural heritage,⁷⁹ the final text of the ICHC contains the following definition:

*The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.*⁸⁰

One of the most important innovations brought about by the ICHC was the strong focus on the participation of local communities. In the Preamble, it recognises ‘that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity’. In addition, Article 15 establishes the principle of ‘the widest possible participation of communities, groups and (...) individuals’. Communities are actually considered to be ‘the main difference between tangible and intangible heritage’.⁸¹

Whilst a comprehensive analysis of the normative content of these Conventions is outside the scope of this research, it is worth mentioning that the ICHC also contains a list system, which has likewise been the target of some criticism, mainly due to the fact that lists depend on State proposals and they ‘[render] transferable the practices and expressions itemised and singled out for attention’.⁸² The Convention established

⁷⁸ The text of the ICHC is available at: <http://www.unesco.org/culture/ich/en/convention>.

⁷⁹ Regarding the debate over the definition of Intangible Cultural Heritage, see Noriko Aikawa-Faure (2009), also explaining the process that led to the adoption of the ICHC in detail.

⁸⁰ Cf. Article 2(1) of the ICHC (emphasis added).

⁸¹ Affirmed by one delegation to the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, as cited in Dawson Munjeri, ‘Following the length and breadth of the roots - Some dimensions of intangible heritage’ in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009).

⁸² Valdimar Tr. Hafstein, ‘Intangible heritage as a list - From masterpieces to representation’ in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009).

the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding – a choice that was probably linked to the success of the WHC system – but it did not represent a perfect solution.⁸³

The risks of creating lists for the purpose of safeguarding cultural heritage are manifold: first, merely selecting what does or does not make it to the list risks contributing to the ‘deletion’ of certain places and traditions, as opposed to the visibility and celebration conferred to certain others.⁸⁴ Second, and more gravely, governments have been known to use cultural heritage to fulfil their own political agendas, sometimes to the detriment of local communities.⁸⁵ Third, whilst tourism, for example, is an appreciable benefit that comes with inscription on the lists, there is still a clear danger that the authenticity of intangible cultural heritage might be compromised.⁸⁶ In addition, many communities (such as indigenous peoples) may not want their heritage recorded and archived and might resist inscription.⁸⁷

To fully understand the evolution of the legal treatment of cultural heritage at the international level, it is important to note that the concept developed according to necessity: the UNESCO Conventions mentioned above all appeared ‘as an *ad hoc* response to a particular crisis or the recognition of new values in cultural heritage’.⁸⁸ The move from ‘cultural property’ to ‘cultural heritage’ mirrors the shift in concerns of the international community, which became progressively more linked to a holistic vision of culture. UNESCO had a fundamental role in this evolution, even though it remained too detached from the human rights system to fully bridge the gap between the protection of cultural heritage and the human rights regime.

⁸³ In this regard, see Craig Forrest (2010), pp. 377-381; and Valdimar Tr. Hafstein (2009).

⁸⁴ See, e.g., Denis Byrne, ‘A critique of unfeeling heritage’ in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009).

⁸⁵ In this sense, see Janette Philp, ‘The political appropriation of Burma’s cultural heritage and its implications for human rights’ in Michele Langfield et al. (eds), *Cultural Diversity, Heritage and Human Rights - Intersections in theory and practice* (Routledge 2010).

⁸⁶ See Sally Ann Ness, ‘Tourism-terrorism: The Landscaping of Consumption and the Darker Side of Place’, 23(1) *American Ethnologist* 118 (2005); and William Logan, ‘Protecting the Tay Nguyen gongs - Conflicting rights in Vietnam’s central plateau’ in Michele Langfield et al. (eds), *Cultural Diversity, Heritage and Human Rights* (Routledge 2010), pp 203-205.

⁸⁷ Larry J. Zimmerman, ‘Plains Indians and Resistance to “Public” Heritage Commemoration of Their Pasts’ in Helaine Silverman and D. Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Springer 2007); and Federico Lenzerini, ‘Indigenous Peoples’ Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge’ in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers 2008).

⁸⁸ Craig Forrest (2010), p. 388.

In light of the above, whilst there is still confusion regarding the use of the concepts of ‘cultural property’ and ‘cultural heritage’,⁸⁹ it appears clear that reducing cultural heritage to property progressively became largely inadequate, as the most recent international instruments give preference to a broader concept, capable of encompassing numerous different elements. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects actually contains a unique choice not to use either of the terms, presenting the concept of ‘cultural objects’ as a more neutral alternative. Not only is ‘property’ a markedly Western concept, deeply associated with *individual* rights of exclusive and undisturbed enjoyment of ownership, but it also hints towards a static view of the cultural object, thus denying the collective, dynamic and ever-changing nature of cultural expression.⁹⁰ The 2001 UNESCO Universal Declaration on Cultural Diversity meaningfully emphasises the inadequacy of property rights to deal with culture (broadly understood), as can be seen from Article 8, which recognises ‘the specificity of cultural goods and services which, as *vectors of identity, values and meaning*, must not be treated as mere commodities or consumer goods’.⁹¹

3. From ‘cultural heritage’ to cultural rights

The progressive preference for the term ‘heritage’ over the term ‘property’ is undeniably connected to the fact that human rights instruments began to recognise cultural rights as fundamental rights, thus reflecting a perspective that detaches culture from merely individualistic or municipal interests and links it to the inherently human pursuit of a sense of identity and community, which is essential to an individual’s full realisation as a person with dignity.⁹²

In spite of the obviously very strong link between cultural heritage and cultural human rights, their legal treatment has historically not reflected the close relationship between the two concepts. In addition, as mentioned above, cultural rights have been very much neglected in the past – ‘treated as “poor relatives” of other human rights’⁹³

⁸⁹ For an extended account of the relationship between ‘cultural property’ and ‘cultural heritage’, see, *inter alia*, Janet Blake (2000).

⁹⁰ In this regard, see Athanasios Yupsanis (2011), pp. 340-341; and Lucille A Roussin, ‘*Cultural Heritage and Identity*’, 11 *Cardozo J Int'l & Comp L* 707 (2003).

⁹¹ Emphasis added.

⁹² See Francesco Francioni, ‘*Public and private in the international protection of global cultural goods*’, 23 *European Journal of International Law* 719 (2012), p. 722.

⁹³ Janusz Symonides (1998).

– and, even though institutional practice very often mentions the category of ‘economic, social and cultural rights’ (ESC), cultural rights are rarely the focus of attention.

One of the reasons that some authors have been pointing out for the lack of development of cultural rights is the fact that there are so little provisions in the international Bill of Rights referring to this category. However, there is a multiplicity of important legal sources, at the international level, referring to cultural rights.

The first instrument that has to be mentioned in this regard is obviously the UDHR, which contains three particularly noteworthy provisions regarding cultural rights, and very significantly associates them with human dignity. The first of these provisions is Article 22, where the connection between cultural heritage and fundamental, intrinsic aspects of the human being is key: it states that everyone is entitled to the realisation of the cultural rights indispensable for his dignity and the free development of his personality. Article 26 of the UDHR refers to the right to education, which is affirmed as essential to the maintenance of peace. More importantly, Article 27⁹⁴ establishes that everyone has the right freely to participate in the cultural life of the community.

The second relevant international instrument is the International Covenant on Economic, Social and Cultural Rights (hereinafter, ICESCR), adopted in 1966 and in force since 1976, which recognises everyone’s right to take part in cultural life and imposes on the parties an obligation to take all steps necessary for the conservation, the development and the diffusion of science and culture.⁹⁵ This Covenant represents yet another step towards the broadening of the scope of cultural rights, so as to cover the enjoyment of culture by individuals.

The ICESCR contains several relevant provisions. First, the Preamble states that ‘these rights derive from the inherent dignity of the human person’ and it affirms that ‘the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights’. Article 1 affirms that ‘[all] peoples have the right of *self-determination*. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ The right to self-determination is intimately connected to cultural identity, especially when it comes to

⁹⁴ For an interesting account of the drafting history of this Article, see Elsa Stamatopoulou (2007), pp. 11-18.

⁹⁵ Cf. Article 15 of the ICESCR, available at <http://www2.ohchr.org/english/law/cescr.htm>.

minorities and indigenous peoples – both self-determination and cultural rights can be exercised and enjoyed collectively, and '[both] are motivated toward ensuring the perpetuation of the group'.⁹⁶ The right to self-determination also encompasses the right of a people to freely dispose of their natural wealth and resources.

Article 13 of the ICESCR recognises the *right to education* in terms similar to the UDHR, highlighting the close relationship between education, the 'full development of the human personality and the sense of its dignity', and the 'maintenance of peace'. In addition, Article 15 enumerates further cultural rights: the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, the right to benefit from the protection of the moral and material interests resulting from scientific, literary or artistic production, and the freedom indispensable for scientific research and creative activity.

Despite the lack of specific reference to cultural rights, the 1966 International Covenant on Civil and Political Rights (hereinafter, ICCPR) also contains a provision that has been crucial in the development of 'pioneering jurisprudence of the Human Rights Committee regarding the cultural rights of persons belonging to minorities and indigenous peoples'.⁹⁷ Article 27 of the ICCPR states that persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

It is important to consider the work of the UN Human Rights Committee in this regard, namely General Comment No. 23,⁹⁸ in which important statements are made. First, the General Comment confirms that Article 27 provides a right conferred on individuals belonging to a minority, distinct from the right to self-determination.⁹⁹ Second, it states that the enjoyment of the rights contained in Article 27 'does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely

⁹⁶ See Ana Filipa Vrdoljak, 'Self-determination and cultural rights' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers 2008).

⁹⁷ See Elsa Stamatopoulou (2007), p. 38.

⁹⁸ Human Rights Committee, CCPR General Comment No 23: Article 27 (Rights of Minorities), UN doc. CCPR/C/21/Rev.1/Add.5 (8 April 1994), available at: <http://www.refworld.org/docid/453883fc0.html>.

⁹⁹ *Idem*, paragraphs 1-3.1.

associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.¹⁰⁰

Third, it clarifies the fact that, even though Article 27 is formulated in negative terms, ‘a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, *but also against the acts of other persons* within the State party.’¹⁰¹

Fourth, the Human Rights Committee states that, even though Article 27 provides for individual rights, ‘they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.’¹⁰²

Finally, the Committee recognises that ‘culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.’¹⁰³

In an important case involving quarrying in indigenous territory in Finland, the Human Rights Committee considered that reindeer husbandry carried out by the Sami community was ‘an essential element of their culture’ and stated that the fact that they had adapted their methods with the help of modern technology did not prevent them from invoking Article 27.¹⁰⁴ However, it stated that ‘measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27’, and that, in this particular case, the impact of the quarrying on Mount Riutusvaara was not so substantial that it effectively

¹⁰⁰ *Idem*, paragraph 3.2.

¹⁰¹ *Idem*, paragraph 6.1.

¹⁰² *Idem*, paragraph 6.2.

¹⁰³ *Idem*, paragraph 7.

¹⁰⁴ *Länsman et al v Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992, Human Rights Committee, 11 June 1992, paragraphs 9.1-9.3.

denied to the authors the right to enjoy their cultural rights, noting that the Sami had been consulted during the proceedings, that measures had been taken to minimise impact and that reindeer herding in the area did not appear to have been adversely affected.¹⁰⁵ The Committee warned that, in the case of future extension of existing contracts and celebration of new ones, which might constitute a violation of article 27, the State would have to ensure that the Sami continued to benefit from reindeer husbandry.¹⁰⁶

Another case that should be mentioned with regard to the implementation of Article 27 of the ICCPR is that of the Japanese Nibutani Dam Decision.¹⁰⁷ This case refers to the expropriation of land for the construction of a dam in the Nibutani region, which has been traditionally occupied by the Ainu, an indigenous people that was not properly recognised as such in Japan until fairly recently. This decision was particularly important because it recognised the indigenesness of the Ainu,¹⁰⁸ as well as their rights under both domestic and international law. The court acknowledged that the Ainu were indeed a minority for the purposes of Article 27, stating, however, that the rights conferred by this article were not unlimited.¹⁰⁹ After assessing the public benefits that the construction of the dam would entail, as well as its costs for the Ainu people, the court affirmed that any restriction to the rights guaranteed by the Constitution and the ICCPR should be recognised only to the 'narrowest possible degree'.¹¹⁰ It then stated:

Of course, it is conceivable that [the many ethnic, cultural, historical, and religious values of the Ainu people] may be compromised for the public interest. But in cases where such concessions are to be sought, there must also be the greatest degree of consideration that includes a sense of remorse concerning matters such as that described above of the historical background of the coerced deterioration of the Ainu people's unique ethnic culture caused by assimilationist policies.¹¹¹

¹⁰⁵ *Idem*, paragraphs 9.4-9.7.

¹⁰⁶ *Idem*, paragraph 9.8.

¹⁰⁷ *Kayano et al v Hokkaido Expropriation Committee (The Nibutani Dam Decision)*, Sapporo District Court, Japan, 27 March 1997, 127 International Law Reports 173.

¹⁰⁸ *Idem*, pp. 209-213.

¹⁰⁹ *Idem*, pp. 206-207.

¹¹⁰ *Idem*, p. 217.

¹¹¹ *Idem*, p. 218.

Ultimately, the court considered that the necessary degree of consideration for the culture of the Ainu had been lacking,¹¹² and affirmed that the project authorisation was illegal, and that this illegality succeeded to the expropriation rulings.¹¹³ Finally, the court did not grant the plaintiffs substantive relief, considering that it would be against the public interest to order the revocation of the expropriation rulings, as the construction of the dam was substantially completed during the pendency of the case.¹¹⁴ Nevertheless, this decision remains important, in that it considered the respect for the cultural rights of indigenous minorities in a way that is aligned with international law and constitutes an example of the emergence of a renewed respect for indigenous peoples.

In this context, it is also imperative to consider the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,¹¹⁵ which was ‘inspired by the provisions of article 27’ of the ICCPR.¹¹⁶ This Declaration sets relevant standards and provides guidance as to what measures States are required to adopt in order to secure the rights of persons belonging to minorities.

It is also important to mention other UN instruments, such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹¹⁷ the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹¹⁸ the 1989 Convention on the Rights of the Child (CRC),¹¹⁹ and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹²⁰ In general terms, these instruments refer to cultural identity, participation in cultural life, linguistic rights, right to education and non-discrimination.

Regional human rights instruments such as the 1950 European Convention on Human Rights¹²¹ (hereinafter, ECHR), adopted by the Council of Europe, and the 1969 American Convention on Human Rights (ACHR)¹²² are silent regarding cultural

¹¹² *Idem*, pp. 219-221.

¹¹³ *Idem*, p. 222.

¹¹⁴ *Idem*, pp. 222-225.

¹¹⁵ Available at: <http://www.un.org/documents/ga/res/47/a47r135.htm>.

¹¹⁶ See Preamble.

¹¹⁷ Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

¹¹⁸ Available at: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

¹¹⁹ Available at: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

¹²⁰ Available at: <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>.

¹²¹ Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹²² Available at: http://www.hrcr.org/docs/American_Convention/oashr.html.

rights, and it was only through subsequent protocols that the subject was introduced in each of the systems.¹²³

In contrast, the 1981 African Charter on Human and Peoples' Rights,¹²⁴ contains several provisions on cultural rights, such as the right to education and the right to economic, social and cultural development, 'with due regard to (...) freedom and identity and (...) the equal enjoyment of the common heritage of mankind.' Article 17(2) of this Charter is equivalent to Article 15(1)(a) of the ICESCR, and states that every individual may freely take part in the cultural life of his community. In a 2010 decision of the African Commission on Human and Peoples' Rights, the first to address the rights of indigenous peoples and their claims to land and natural resources, there is a clear view of culture in a holistic sense, as a 'complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.'¹²⁵ At stake in this case was the removal of the Endorois, a pastoralist community, from their ancestral lands, which were gazetted as a game reserve. The complainants considered this removal to have happened without proper prior consultations, adequate and effective compensation.

In this decision, the African Commission explicitly recognised the indigenoussness of the Endorois.¹²⁶ Furthermore, whilst assessing the alleged violation of Article 17, it made several important statements. First, it affirmed that 'protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity', and that 'Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community'.¹²⁷ It

¹²³ See the 1952 *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* (First Protocol), available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf; and the 1988 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, available at: <http://www.oas.org/juridico/english/Treaties/a-52.html>.

¹²⁴ Available at: <http://www.achpr.org/instruments/>.

¹²⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Comm No 276/2003, 4 February 2010, paragraph 241.

¹²⁶ *Idem*, paragraph 162.

¹²⁷ *Idem*, paragraph 241.

further stated that, due to the many threats faced by minority or indigenous communities like the Endorois, such as displacement, poverty, forced assimilation and political marginalisation, the State had an especially high duty to take positive steps to protect their identity and culture.¹²⁸

The African Commission also held that the absence of a clawback clause in the relevant provision was ‘an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people’s right to culture’.¹²⁹ If a limitation were to be imposed, the Commission affirmed that it would have to be ‘proportionate to a legitimate aim that does not interfere adversely on the exercise of a community’s cultural rights’, and that, in this particular case, even if the game reserve was a legitimate aim, Kenya’s failure to secure access for the Endorois was neither proportionate nor justified, as their cultural activities posed no harm to the reserve’s ecosystem and the ‘restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community’.¹³⁰ The Commission concluded that, by restricting access to Lake Bogoria, Kenya had denied the Endorois ‘access to an integrated system of beliefs, values, norms, mores, traditions and artifacts’, and that by forcing them to live on semi-arid lands without access to vital resources for the health of their livestock, Kenya had ‘created a major threat to the Endorois pastoralist way of life’ and, in practice, rendered their right to culture ‘illusory’.¹³¹

The Charter of Fundamental Rights of the EU, proclaimed in 2000 and adapted in 2012 to the entry into force of the Treaty of Lisbon,¹³² states in the Preamble that the Union ‘(...) respect[s] the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States’, whilst Article 22 affirms the respect for ‘cultural, religious and linguistic diversity’ and Article 25 guarantees the right of elderly people to participate in cultural life. It should be noted that the Council of Europe adopted another important instrument in 2005: the Framework Convention on the Value of Cultural Heritage for Society (Faro Convention).¹³³ This Convention, as Stamatopoulou points out, ‘presents a shift from the question of *how* to preserve cultural heritage, to the question *why* the value of

¹²⁸ *Idem*, paragraph 248.

¹²⁹ *Idem*, paragraph 249.

¹³⁰ *Ibidem*.

¹³¹ *Idem*, paragraphs 250-251.

¹³² Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

¹³³ Available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680083746>.

cultural heritage should be enhanced and for whom. It is based on the idea that knowledge and the use of heritage form part of the citizen's right to participate in cultural life as proclaimed in the [UDHR].¹³⁴ One particularly interesting provision in this Convention is Article 8, which provides for the recourse to cultural heritage impact assessments and the adoption of mitigation strategies.

As Francioni points out, even though there is a relative scarcity of binding provisions related to cultural rights within the realm of human rights instruments, it is easy to find references to this category in several other international instruments,¹³⁵ of which UNESCO has been the most prolific originator. It is useful to refer to the most relevant of these instruments. The 1966 UNESCO Declaration on the Principles of International Cultural Cooperation¹³⁶ is extremely important, as it affirms, in Article 1, that '[e]ach culture has a dignity and value which must be respected and preserved', '[e]very people has the right and the duty to develop its culture' and '(...) all cultures form part of the common heritage belonging to all mankind.'

Furthermore, the 1976 Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It¹³⁷ addresses, among others, the right to education, access to culture, participation in cultural life and linguistic rights. In 1989, UNESCO adopted the Recommendation on the Safeguarding of Traditional Culture and Folklore,¹³⁸ which covers the identification, conservation, preservation, dissemination and protection of folklore, through international co-operation. It is also critical to refer the 1996 Universal Declaration of Linguistic Rights, adopted in Barcelona, which recognises both individual and collective rights, with the proposed aim of 'correct[ing] linguistic imbalances with a view to ensuring the respect and full development of all languages and establishing the principles for a just and equitable linguistic peace throughout the world as a key factor in the maintenance of harmonious social relations.'¹³⁹ In 2001, UNESCO adopted the Universal Declaration on Cultural Diversity,¹⁴⁰ which, among other important provisions, affirms that

¹³⁴ Elsa Stamatopoulou (2007), p. 45 (emphasis added).

¹³⁵ Francesco Francioni (2008), p. 2.

¹³⁶ Available at:

http://portal.unesco.org/en/ev.php-URL_ID=13147&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹³⁷ Available at:

http://portal.unesco.org/en/ev.php-URL_ID=13097&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹³⁸ Available at:

http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹³⁹ See preamble of the Declaration, available at:

<http://www.unesco.org/cpp/uk/declarations/linguistic.pdf>.

¹⁴⁰ Available at:

http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html.

'[c]ultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights (...)'.¹⁴¹

The International Labour Organisation (hereinafter, ILO) also plays an important role in the area of cultural rights, particularly with regard to indigenous peoples' rights. ILO Convention no. 169¹⁴¹ establishes, *inter alia*, that governments have the responsibility for developing co-ordinated and systematic action to promote the full realisation of the social, economic and cultural rights of indigenous peoples, with respect for their social and cultural identity, their customs and traditions and their institutions.

Finally, it is crucial to acknowledge the role played by the 2007 UN Declaration on the Rights of Indigenous Peoples (hereinafter, UNDRIP),¹⁴² which was adopted by an overwhelming majority, after almost 25 years of negotiations. In addition to addressing cultural rights, it is the first international legal instrument that expressly recognises indigenous peoples' right to self-determination. Contrary to what occurs with Conventions, UN Declarations are not deemed legally binding, which means that, formally, they contain mere aspirational statements that do not impose obligations or responsibilities upon States. However, 'while this principle is generally accurate, it cannot be applied to the [UNDRIP] when it is used as an interpretative standard for state obligations contained in human rights conventions, and where the obligation, or alleged violation, pertains to indigenous peoples. In these cases the provisions of the Declaration are binding on states.'¹⁴³ This is in line with the considerations expressed by the former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, who affirmed:

(...) even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the United Nations Charter, other treaty commitments and to customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and

¹⁴¹ Available at:

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314:NO

¹⁴² Available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

¹⁴³ Mililani B. Trask, 'Afterword: Implementing the Declaration' in Elvira Pulitano, *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012), p. 334.

*cultural integrity that are incorporated into widely-ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to connect to a consistent pattern of international and state practice, and hence to that extent they reflect customary international law (...).*¹⁴⁴

4. The normative content of cultural rights

4.1. The right to participate in cultural life

There are essentially five human rights recognised in international law as cultural rights: (1) the right to education; (2) the right to participate in cultural life; (3) the right to enjoy the benefits of scientific progress and its applications; (4) the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author; and (5) the freedom indispensable for scientific research and creative activity – all affirmed in the ICESCR, Articles 13 and 15.

Of all the cultural rights mentioned above, this research focuses mainly on the right to participate in cultural life, as established in Article 15(1) of the ICESCR and Article 27 of the UDHR, since this is the aspect that appears to be more relevant to the interaction between cultural rights and investment. Whilst an in-depth analysis of the normative content of these rights is outside the scope of this dissertation, it is nonetheless crucial to provide a portrait of the main elements that compose the right to participate in cultural life.

Before that, it is however necessary to point out other human rights intimately connected to cultural rights, which will be useful for this research. In fact, cultural rights are ‘one of the most eloquent demonstrations of the inter-complementarity of human rights’,¹⁴⁵ as evidenced by the sheer number of rights that are interconnected with culture as a way of life, and therefore, with the right to participate in cultural life. This results, on the one hand, from the fact that culture is present in virtually every

¹⁴⁴ Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Agenda Item 4: The United Nations Declaration on the Rights of Indigenous Peoples (15 July 2010), available at: <http://unsr.jamesanaya.org/statements/statement-on-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-to-the-emrip>.

¹⁴⁵ Elsa Stamatopoulou (2007), p. 143.

aspect of human life, therefore permeating the areas of civil, political, economic and social rights. On the other hand, it appears clear that the effective implementation of most human rights depends on the effective implementation of cultural rights, especially in respect of ethnic minorities and indigenous peoples, and vice-versa. For example, it is impossible to think of cultural rights without freedom of peaceful assembly and freedom of association – how could anyone reasonably be able to exercise their right to participate in cultural life (a right which is, by definition, exercised collectively) without being able to assemble as a group? Conversely, the right to self-determination only makes sense if a community has an established sense of identity that is alive through cultural rights. In turn, cultural identity is intrinsically linked to human dignity, which is evident from the legal sources identified above.

4.2. The normative content of the right to participate in cultural life

So what constitutes a cultural right? What is the normative content of the right to participate in cultural life? The answer to these questions relies heavily on the work of the Committee on Economic, Social and Cultural Rights, both in terms of the requirements for, (and assessment of) States parties' reports and, perhaps more importantly, General Comments (in particular, General Comment no. 21 on the right of everyone to take part in cultural life).¹⁴⁶ The introduction to General Comment no. 21 starts off by making an important statement:

*Cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.*¹⁴⁷

This statement is particularly important when considering that several commentators and even governments questioned for decades the very nature of ESC rights as enforceable human rights. In fact, it has been argued that, instead of establishing positive obligations on States, cultural rights constitute norms of a programmatic nature, subject to progressive realisation, and non-enforceable for the rights

¹⁴⁶ Committee on Economic, Social and Cultural Rights, 'General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)' (E/C.12/GC/21, 2009).

¹⁴⁷ Emphasis added.

holders.¹⁴⁸ Hence the importance of these paragraphs, read in conjunction with paragraph 1 (cited above), which affirm that:

The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).

(...)

*The strategies and policies adopted by States parties should provide for the establishment of effective mechanisms and institutions, where these do not exist, to investigate and examine alleged infringements of article 15, paragraph 1 (a), identify responsibilities, publicize the results and offer the necessary administrative, judicial or other remedies to compensate victims.*¹⁴⁹

It appears therefore clear that international HRL, as it stands today and through the interpretation of treaty bodies, recognises cultural rights as true and enforceable human rights.

The General Comment proceeds to qualify the right to participate in cultural life as a 'cultural choice', i.e., individuals are free to choose whether or not to participate in a specific culture, individually or collectively.¹⁵⁰ This aspect of cultural rights is connected to what can be described as (the absence of) internal restrictions to the enjoyment of one's right to culture – adopting Kymlicka's terminology.¹⁵¹ According to this author, internal restrictions (as opposed to external protections) involve 'the claim of a group against its own members (...) [and are] intended to protect the group from the destabilizing impact of *internal dissent* (e.g. the decision of individual members not to follow traditional practices or customs)'.¹⁵² The Committee on Economic, Social and Cultural Rights highlights the fact that the *freedom* implicated in cultural rights

¹⁴⁸ See, *inter alia*, E.W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', 9 Netherlands Yearbook of International Law 69 (1978), p. 83 *et seq.*; and Yvonne Donders, 'A Right to Cultural Identity in UNESCO' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers 2008), p. 318.

¹⁴⁹ General comment No. 21, paragraphs 6 and 72 (emphasis added).

¹⁵⁰ *Idem*, paragraph 7 of General Comment No. 21.

¹⁵¹ Will Kymlicka, *Multicultural Citizenship* (Oxford University Press 1995), p.35 *et seq.*

¹⁵² *Idem*, p. 35.

must be enjoyed as a choice, 'recognized, respected and protected on the basis of equality'.¹⁵³

Regarding the clarification of some of the terms used in Article 15(1) of the ICESCR, paragraph 15 of the General Comment mentions the main components of the right to participate in cultural life and it establishes that the word 'everyone' is meant to be understood as either the individual or the collective. As to the term 'culture', the Committee adopted the maximalist, mostly anthropological sense of the word.

General Comment No. 21 also clarifies the conditions for the 'full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination.' These conditions comprise of: (1) *availability* of cultural goods and services; (2) *accessibility*, including physical, financial and geographic factors; (3) *acceptability*, which is intimately connected with both community and individual participation; (4) *adaptability*, with due regard to cultural diversity; and, finally, (5) *appropriateness* or cultural adequacy, especially regarding ethnic minorities and indigenous peoples.¹⁵⁴

In respect of the principles of non-discrimination and equal treatment, the Committee highlights the applicability of Articles 2(2) and 3 of the ICESCR to the right to take part in cultural life. This means that 'no one shall be discriminated against because he or she chooses to belong, or not to belong, to a given cultural community or group, or to practise or not to practise a particular cultural activity. Likewise, no one shall be excluded from access to cultural practices, goods and services.' Non-discrimination and equal treatment are mandatory, even in situations of 'severe resource constraints'. It is further affirmed that positive discrimination is legitimate, as long as it is temporary and does not perpetuate inequalities.¹⁵⁵

General Comment no. 21 further emphasises the fact that internationally recognised human rights may not be limited or infringed upon on grounds of cultural diversity. Limitations to the right to take part in cultural life have to be undertaken with due respect for proportionality.¹⁵⁶ In this regard, the Limburg Principles on the Implementation of the ICESCR, developed in 1986 by a group of experts in international law, establish the principle that Article 4 of the ICESCR (limitations to

¹⁵³ General comment No. 21, paragraph 7.

¹⁵⁴ *Idem*, paragraph 16.

¹⁵⁵ *Idem*, paragraphs 21-24.

¹⁵⁶ *Idem*, paragraphs 17-20.

ESC rights) 'was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State'. It further affirms that no limitations can be made unless provided by national law of general application, and that this law shall not be arbitrary, unreasonable or discriminatory.¹⁵⁷ The Limburg Principles were later supplemented by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, which were prepared at another meeting of experts in international law, in 1997, and will be referred to again below, in Section 4.4.

It is interesting to note that the Committee dedicated an entire section of the General Comment to the issue of cultural diversity, affirming that '[t]he protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, and requires the full implementation of cultural rights, including the right to take part in cultural life.' It goes on to comment on the phenomena of globalisation and mass migration, integration and assimilation, and to demand from States that the adverse effects of globalisation be mitigated so as to protect the right to take part in cultural life. In harmony with provisions from the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, as well as with the Universal Declaration on Cultural Diversity, the Committee stresses that cultural goods, services and activities should not be treated as having solely commercial value, and should rather be seen holistically as vehicles for 'identity, values and meanings.'¹⁵⁸

4.3. Legal obligations

The Committee on Economic, Social and Cultural Rights devoted an entire section of General Comment no. 21 to the subject of States parties' legal obligations regarding the right to participate in cultural life. These obligations are divided into four categories: (1) general legal obligations; (2) specific legal obligations; (3) core obligations; and (4) international obligations.

Within the first category, the Committee states that the right to participate in cultural life entails an *immediate obligation* to guarantee that it 'is exercised without

¹⁵⁷ 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1986), paragraphs 46-49.

¹⁵⁸ General comment No. 21, paragraphs 40-43.

discrimination', to ensure that cultural practices are recognised, and to 'refrain from interfering in their enjoyment and development'. It further affirms that the progressive realisation of cultural rights entails an obligation to 'take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life', and that States should take the steps 'necessary for the conservation, development and dissemination of science and culture, as well as steps to ensure respect for the freedom indispensable to scientific research and creative activity'. Finally, there is a prohibition of regressive measures.

As to States' specific legal obligations, the Committee refers to the obligations to: (1) respect, (2) protect, and (3) fulfil. Expanding on these obligations, the Committee affirms:

*The obligation to respect requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. The obligation to protect requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life. Lastly, the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in article 15, paragraph 1 (a), of the Covenant.*¹⁵⁹

Additionally, the General Comment includes a specification of what constitutes each of these obligations. The first one (*obligation to respect*) entails the duty to adopt specific measures aimed at realising the rights of everyone: (1) 'to freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected'; (2) 'to enjoy freedom of opinion, freedom of expression in the language or languages of their choice, and the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind'; (3) 'to enjoy the freedom to create, individually, in association with others, or within a community or group, which implies that States parties must abolish censorship of cultural activities in the arts and other forms of expression'; (4) 'to have access to their own cultural and linguistic heritage and to that of others'; and (5) 'to take part freely in an active and informed way, and without discrimination, in any important

¹⁵⁹ *Idem*, paragraph 48 (emphasis added).

decision-making process that may have an impact on his or her way of life and on his or her rights’.

The *obligation to protect*, which is intimately connected with the obligation to respect, obliges States parties to ‘take measures to prevent third parties from interfering in the exercise of [the] rights [stated above].’ Additionally, it entails the obligations: (1) to ‘[r]espect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters’; (2) to ‘[r]espect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups, in economic development and environmental policies and programmes’; (3) to ‘[r]espect and protect the cultural productions of indigenous peoples, including their traditional knowledge, natural medicines, folklore, rituals and other forms of expression; and (4) to ‘[p]romulgate and enforce legislation to prohibit discrimination based on cultural identity, as well as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.’ Here, the inseparability of the protection of cultural heritage and cultural rights is clearly demonstrated.

The *obligation to fulfil* entails the obligations: (1) to ‘*facilitate* the right of everyone to take part in cultural life by taking a wide range of positive measures, including financial measures, that would contribute to the realization of this right’; (2) to *promote* the right to participate in cultural life through ‘appropriate education and public awareness’ measures; (3) to ‘*provide* all that is necessary for fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realize this right for themselves with the means at their disposal.’¹⁶⁰

Within the third category (core obligations), the Committee points out ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights set out in the Covenant’, which materialises in ‘at least the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice.’ This entails immediate obligations to: (1) take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life’; (2) ‘respect the right of everyone to identify or not identify themselves with one or more communities, and the

¹⁶⁰ *Idem*, paragraphs 49-54.

right to change their choice'; (3) 'respect and protect the right of everyone to engage in their own cultural practices, while respecting human rights'; (4) 'eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind'; and (5) 'allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them' (free and informed prior consent).¹⁶¹

Finally, the fourth category (international obligations) includes: (1) the obligation of States parties to take steps, individually and through international assistance and cooperation, especially through economic and technical cooperation, with a view to achieving the full realization of the rights recognized in the Covenant'; (2) the obligation to celebrate appropriate international agreements for such cooperation; and (3) the obligation to refrain from negotiating and celebrating international agreements which negatively affect the right to take part in cultural life, especially for vulnerable groups. These obligations are very significant for the subject of this research, as they directly constrain States parties' freedom to negotiate and celebrate international agreements, be it IIAs, loans from financial institutions or other instruments.

4.4. Violations of the right to participate in cultural life

Both the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights and General Comment no. 21 refer amply to violations of the right to participate in cultural life. The first document affirms that violations of the obligations to respect, protect and fulfil, undertaken either by commission or omission, disregarding an obligation of conduct or an obligation of result, entail State responsibility. In addition, paragraph 18 of the Maastricht Guidelines states:

The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social

¹⁶¹ *Idem*, paragraph 55.

and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.

With regard to State responsibility for acts by non-state entities, General Comment no. 21 confirms that '[v]iolations can occur through the direct action of a State party or of other entities or institutions that are insufficiently regulated by the State party, including, in particular, those in the private sector.'¹⁶²

In addition, the Committee highlights the fact that 'when a State party fails to take steps to combat practices harmful to the well-being of a person or group of persons', i.e. *cultural wrongs*, there is also a violation of the ICESCR.

Finally, General Comment no. 21 asserts that retrogressive measures taken by States, in respect of the right to culture, 'require the most careful consideration and need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'^{163,164}

5. A (collective) right to culture?

The question of who holds cultural rights is of paramount importance, particularly when it comes to the distinction between individual and collective rights. As mentioned above, some of the reasons behind the underdevelopment of cultural rights are intimately connected to both the issue of cultural relativism and the difficulties regarding the recognition of collective rights at the level of local communities. Although several of the instruments mentioned above refer to a collective aspect of the enjoyment of cultural rights, the international community has hesitated very significantly when it comes to the association of the words 'collective' and 'rights'. Several factors can be identified when considering this hesitation, one of which is obviously the fear that the universality of human rights becomes compromised.

The first step to understanding the debate around collective human rights is to assess, first and foremost, what constitutes a human right and what its characteristics are.

¹⁶² *Idem*, paragraph 62.

¹⁶³ General comment No. 21, paragraph 65.

¹⁶⁴ For a detailed analysis of State obligations, violations and justiciability of economic, social and cultural rights, see, *inter alia*, Elsa Stamatopoulou (2007), pp. 148-162; see also Victor Dankwa et al., 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', 20 Hum Rts Q 705 (1998).

Human rights, as established in the UDHR (and, later, in the ICCPR and ICESCR), are typically seen as a 'trump' against the State: international human rights are exercised against the State and impose on it a number of obligations. The State is, at the same time, the main protector and main violator of human rights.

The liberal concept of human rights gravitates around the individual, not a group. Human rights are *universal* and *inalienable* fundamental rights that every human being is entitled to just because he is human, and which he or she cannot abdicate. All members of humankind, everywhere in the world, are entitled to human rights. They are traditionally seen as *equal* and *non-discriminatory*, in the sense that they are held and exercised equally by every human being, i.e. 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'¹⁶⁵ Human rights are also *indivisible*, in the sense that individuals are entitled to all internationally recognised human rights, whether civil, political, economic, social or cultural, as all of them are inherent to human dignity and thus cannot be ordered hierarchically. Additionally, human rights are all *interrelated* and *interdependent*, which means they are all functionally connected, i.e. denial of one right will result in others not being fully recognised and/or exercised.

Whilst discussing the full spectrum of the debate on collective human rights is outside the scope of this research, it is nonetheless important to understand some of the arguments involved. For many commentators, there can be no such thing as collective human rights; groups can obviously be entitled to some rights, but these cannot be *human* rights. If human rights are held by human beings, and human beings are by definition *individuals*, there is no logical reason for group rights to exist.¹⁶⁶ In contrast, other authors accept the existence of collective human rights, to different degrees. For instance, Donnelly affirms that 'individual rights approaches usually are capable of accommodating the legitimate interests of even oppressed groups – and (...) where they are not, group human rights rarely will be more likely to provide an

¹⁶⁵ Article 2 of the UDHR.

¹⁶⁶ See Peter Jones, 'Human rights, group rights, and peoples' rights', 21 Human Rights Quarterly 80 (1999); and Jack Donnelly, 'Human rights, individual rights and collective rights' in Jan Berting et al. (eds), *Human rights in a pluralist world: individuals and collectivities* (Meckler 1990).

effective remedy.¹⁶⁷ According to this author, since ‘for a group right to be a *human* right, it must be universal in the sense that all groups of the specified type have that right’, the only unambiguous collective human right in international law is the right of peoples to self-determination.¹⁶⁸ He nevertheless accepts that both the rights of indigenous peoples and a right to cultural heritage are ‘strong candidate[s]’ to consideration as group human rights, since each of them is ‘irreducibly a group right, [which] applies to all [peoples in the same situation] and seems to be in the process of being widely recognized as a standard threat to human dignity that requires remedy’.¹⁶⁹ Others, such as Jones, also consider that there may be other group rights besides the right of peoples to self-determination, but require a distinction between corporate rights (e.g., the rights of a ‘nation’ or a ‘state’ as a corporate entity) and collective rights (those borne by individuals ‘jointly, rather than severally’).¹⁷⁰

According to Vrdoljak, ‘[s]elf-determination and cultural rights sit uncomfortably within the classic human rights framework’, since both ‘can, and are, held and exercised collectively’, and both ‘are motivated toward ensuring the perpetuation of the group’.¹⁷¹ Whilst the right of peoples to self-determination has been recognised widely, namely by the International Court of Justice (hereinafter, ICJ), according to which this right is ‘a right *erga omnes*’,¹⁷² cultural rights remain a subject of debate. The development of cultural human rights in international law has traditionally been centred around the rights of indigenous peoples, ethnic minorities and other vulnerable groups, mainly those that were the victims of historical wrongs such as colonialism and forced assimilation, and who were deprived of their right to self-determination. Vrdoljak significantly affirms that ‘[t]hese groups have tested the boundaries of international law and challenged established state practice on self-determination and cultural rights’.¹⁷³ By the same token, Donnelly states that ‘[c]olonialism (...) is a well-recognized standard threat to human dignity’ and ‘[d]ecolonization thus is a practical prerequisite to the enjoyment of internationally recognized human rights. And it is the subjected people as a group that have this right’.¹⁷⁴

¹⁶⁷ Jack Donnelly, *Universal human rights in theory and practice* (Cornell University Press 2013), p. 46.

¹⁶⁸ *Idem*, p. 48.

¹⁶⁹ *Idem*, p. 49.

¹⁷⁰ Peter Jones (1999).

¹⁷¹ Ana Filipa Vrdoljak (2008), p. 41.

¹⁷² See the case of East Timor (Portugal v. Australia), Judgment (ICJ, 1995).

¹⁷³ Ana Filipa Vrdoljak (2008), p. 42.

¹⁷⁴ Jack Donnelly, *Universal human rights in theory and practice* (2013), p. 49.

Kymlicka is against the use of the term 'collective rights', which he considers to be 'unhelpful', 'too broad' and one which does not reflect the distinction between internal restrictions and external protections. According to this author, 'a deeper problem is that it suggests a false dichotomy with individual rights'.¹⁷⁵ More interestingly, Kymlicka believes that asking whether a right exercised by individuals belonging to a group is tantamount to a collective right is a 'sterile' debate, 'because the question of whether the right is (or is not) collective is morally unimportant'.¹⁷⁶ For him, the debate should focus instead on why some rights should be group-differentiated, i.e. why some groups are entitled to rights that other groups do not hold. Similarly to Vrdoljak, Kymlicka argues that '[j]ust as certain individual rights flow from each individual's interest in personal liberty, so certain community rights flow from each community's interest in self-preservation'.¹⁷⁷

Whilst some authors fear that group rights might pose a threat to individual rights – which have been affirmed in part to protect individuals from negative effects of certain groups' powers – Kymlicka defends that '[group-differentiated rights] are not about the primacy of communities over individuals. Rather, they are based upon the idea that justice between groups requires that the members of different groups be accorded different rights'.¹⁷⁸ This author concludes that limitations on group rights are as important as recognising them: 'minority rights should not allow one group to dominate other groups; and they should not enable a group to oppress its own members. In other words, liberals should seek to ensure that there is equality *between* groups, and freedom and equality *within* groups'.¹⁷⁹ Conversely, Donnelly defends that group-differentiated rights are not necessary; he states that '[i]f a particular [group] identity is valued sufficiently, it will survive, perhaps even thrive. If not, then it will not'.¹⁸⁰ He appears to accept that consequence lightly, but his reasoning seems to be more connected to Kymlicka's notion of internal restrictions than to his idea of external protections.

In terms of international practice, it appears that some human rights – namely, the right to culture – are considered group rights, despite all the controversy in legal and

¹⁷⁵ Will Kymlicka (1995), p. 45.

¹⁷⁶ *Ibidem*.

¹⁷⁷ *Idem*, p. 47.

¹⁷⁸ *Ibidem*.

¹⁷⁹ *Idem*, p. 194.

¹⁸⁰ Jack Donnelly, *Universal human rights in theory and practice* (2013), p. 54.

political theory. An example of this is present in General Comment no. 21, which affirms:

(...) the term “everyone” in the first line of article 15 may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.

Although the difference between a right being held by a group and an individual right being exercised in the context of a group can be of significant theoretical importance,¹⁸¹ this affirmation by the Committee on Economic, Social and Cultural Rights is highly relevant, as it denotes international acceptance of the exercise of cultural rights by communities or groups. Conversely, the Human Rights Committee, in General Comment no. 23, asserts the following:

The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.¹⁸²

Even though some international legal instruments refer to the rights of persons belonging to ethnic, linguistic or religious minorities, not the rights of minorities themselves, it is important to note that there are some elements that imply recognition of the importance of groups – such is the case of the above-mentioned Article 27 of the ICCPR, which refers to persons belonging to minorities, but also contains the qualifier ‘in community with the other members of their group’.

Other international instruments refer to collective rights of minorities and indigenous peoples, such as the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which affirms that: ‘[p]ersons

¹⁸¹ This is a matter of extreme complexity and an in-depth discussion of all the implications of the issue is obviously outside the scope of this research. For a more detailed view of the problem, see Will Kymlicka (1995); Jack Donnelly, ‘Human rights, individual rights and collective rights’ (1990); Jack Donnelly, *Universal human rights in theory and practice* (2013); and Elsa Stamatopoulou (2007).

¹⁸² Human Rights Committee, ‘General Comment No. 23: The rights of minorities (Art. 27)’ (CCPR/C/21/Rev.1/Add.5, 1994) (emphasis added).

belonging to minorities may exercise their rights, including those set forth in the present Declaration, *individually as well as in community* with other members of their group, without any discrimination.¹⁸³ By the same token, the CRC establishes that a child who belongs to a minority or indigenous group shall not be denied the right to enjoy his or her culture in community with other members of his or her group.¹⁸⁴

ILO Convention No. 169, in turn, provides that '[i]ndigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination', therefore not using the classical expression 'people belonging to...'. The UNDRIP specifically refers to collective rights at several instances; to start with, the Preamble recognises and affirms 'that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.' In addition, in Article 7(2), the UNDRIP recognises that '[i]ndigenous peoples have the *collective right* to live in freedom, peace and security as distinct peoples (...)' ; Article 40 states that indigenous peoples are entitled to 'effective remedies for all infringements of their *individual and collective rights*'.

In light of the above, it is possible to conclude that collective rights are indeed recognised in international law, even if their nature as human rights remains contested. Regardless, for the purposes of this research, cultural rights will be understood in the same sense as described in General Comment no. 21 of the Committee on Economic, Social and Cultural Rights, i.e. either as individual or collective rights, exercised 'by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.' Individuals cannot enjoy their culture in isolation. Culture is inherently relational. Therefore, it would be unrealistic to deny the collective aspect of cultural rights.

6. A brief note on cultural relativism

There is a further issue that needs clarification in the context of the intersection of culture with human rights. As mentioned above, one of the reasons why cultural rights have been so underdeveloped is the fact that 'culture' is a difficult concept in terms

¹⁸³ Article 3 of the 1992 Declaration.

¹⁸⁴ Article 30 of the CRC.

of the debate it creates between universalists and cultural relativists. In any event, not only does the idea of cultural relativism jeopardise the development of cultural rights, but it has also been used as a political tool to question the validity of all human rights – even though almost all States in the world have committed to international human rights instruments. The notion of cultural relativism is not a legal one; rather, it draws from anthropology and moral philosophy.¹⁸⁵

An illustration of extreme positions regarding each of the theories serves best to explain the clash: whilst radical universalists believe that ‘culture is irrelevant to the validity of moral rights and rules, which are universally valid’, radical cultural relativists ‘hold that culture is the sole source of the validity of a moral right or rule’.¹⁸⁶ The latter therefore believe that it is impossible to establish a universally valid set of rules determining what is right and what is wrong, since this judgment can only be made in light of the dominant culture for each specific community. This, in turn, would mean that human rights cannot be defined equally for all societies in the world, and should rather accommodate specific cultural views. The formulation of each theory can vary in different degrees of strength, depending on the level of acceptance of the interaction between the two perspectives, and most modern literature adopts a mitigated view of either universalism or relativism. Hence, some authors defend that *the majority* of moral rights or rules are determined by universal values, but an element of cultural relativism will necessarily imply the consideration of certain context-specific cultural values;¹⁸⁷ other authors state that *the majority* of moral rights and rules are determined by culture, even though some universal values apply.¹⁸⁸ The main claim of cultural relativism, independently of degree, is that what constitutes a human rights violation in one society can very well not be considered as such in a different society with a different culture.

Although an in-depth analysis of cultural relativism and universalism is outside the scope of this research,¹⁸⁹ it is still important to note a few key points in the debate,

¹⁸⁵ Fernando R Teson, ‘*International Human Rights and Cultural Relativism*’, 25 Va J Int’l L 869 (1984), p. 870.

¹⁸⁶ Jack Donnelly, ‘*Cultural relativism and universal human rights*’, 6 Human Rights Quarterly 400 (1984), p. 400.

¹⁸⁷ In this sense, see Jack Donnelly, ‘*The relative universality of human rights*’, 29 Human Rights Quarterly 281 (2007).

¹⁸⁸ In this sense, see Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford University Press 2005), p. 31.

¹⁸⁹ And, indeed, for some authors, this topic is considered as a ‘rather tired debate’ – see Michael Goodhart, ‘Human Rights and the Politics of Contestation’ in Mark Goodale (ed), *Human Rights at the Crossroads* (Oxford University Press 2014), p. 31.

the first of which is that cultural pluralism (or *relativity*) is an undeniable fact: all over the world, different societies have different worldviews, different traditions, different sets of values. Nevertheless, this does not necessarily mean that the fundamental aspects of human rights should not apply to every human being, despite geographic location, since all persons share in the same inherent dignity. Secondly, human rights are not universal in the sense of being respected and promoted everywhere, by everyone: it is also a fact that there are numerous human rights violations across the globe, ranging from torture and oppression to starvation and mutilation. This notwithstanding, and in harmony with Kantian theories, one could argue that ‘the *fact* of pluralism in ways of life cannot invalidate claims about moral truth’.¹⁹⁰

The theory of human rights (as universal, inalienable and non-discriminatory rights) stems from Western philosophy and the idea of ‘natural law’, the latter flowing from the work of legal and political theorists and philosophers such as John Locke.¹⁹¹ This in itself raises problems, with authors such as Bentham saying that natural rights are ‘nonsense upon stilts’, and MacIntyre affirming: ‘the truth is plain: there are no such rights and belief in them is one with belief in witches and unicorns’.¹⁹² Most authors accept that contemporary human rights have their origin in a very specific context: European States in the post-war.¹⁹³ Thus the UDHR can be seen as ‘universal only in pretension, not in practice, since it is a charter of an idealist European political philosophy’.¹⁹⁴ This raises concerns that human rights rooted in such a specific context become reminiscent of colonialism, ‘a mask for western interests or a new form of imperialism, or both’,¹⁹⁵ and this position becomes stronger when considering that the West often appears to have double standards, supporting regimes that systematically compromise human rights, mostly due to strong economic interests. Developing countries, in particular, argue that human rights are a tool for Western domination and for the undermining of their sovereignty. In this regard, the US has

¹⁹⁰ Nicholas Rengger, ‘*The world turned upside down? Human rights and International Relations after 25 years*’, 87 *International Affairs* 1159 (2011), p. 1171. On the other hand, authors such as Goodhart argue against the claims about moral truth – see Michael Goodhart (2014).

¹⁹¹ Although it is possible to trace the origins of natural rights to ancient Rome and Greece; in this sense, see Anthony Pagden, ‘*Human Rights, Natural Rights, and Europe’s Imperial Legacy*’, 31 *Political Theory* 171 (2003).

¹⁹² Both cited in Richard A. Wilson (1997).

¹⁹³ Conversely, Moyn considers the real origin of contemporary human rights to be in the 1970s, not in the 1940s: Samuel Moyn, ‘*Human Rights in History*’ (2010), available at: <http://www.thenation.com/article/human-rights-history/>.

¹⁹⁴ Richard A. Wilson (1997), p. 4.

¹⁹⁵ Nicholas Rengger (2011), p. 1173.

been especially criticised for confusing their foreign policy with human rights, and ‘American interests with universal values’.¹⁹⁶

Another critique that frequently arises in this regard affirms that Western human rights are excessively individualistic, and therefore unable to grasp the realities of communities that place the emphasis on the collective aspects of their society, rather than on the individual ones. In the words of Falk, the UN operates with a ‘normative blindness towards indigenous peoples’.¹⁹⁷

Some of the concerns raised by cultural relativists are obviously pertinent; however, it is important to see that there are several limitations and problems inherent to that perspective, the worst of which is the ‘moral nihilism’ that it entails.¹⁹⁸ I believe that the best option is to seek an ‘overlapping consensus’, as described by John Rawls: people who endorse different – and sometimes incompatible – comprehensive doctrines can nonetheless reach a level of agreement (an overlapping consensus) on what constitutes a political conception of justice.¹⁹⁹ In essence, there would be ‘a special kind of agreement by which the same principles and ideals of the political conception are going to be affirmed for different reasons from the standpoint of each comprehensive doctrine’.²⁰⁰

Donnelly provides a good balance between the more extreme views, with a theory of ‘relative universality’, which embraces Rawls’s idea of overlapping consensus – at least at the conceptual level, given that ‘adherents of most leading comprehensive doctrines pretty much across the globe do in fact endorse internationally recognized human rights’.²⁰¹ Very differently, at the level of enjoyment of human rights, the author defends a certain level of cultural relativism. As he explained in a previous paper,

Human rights are (relatively) universal at the level of the concept, broad formulations such as the claims in Articles 3 and 22 of the Universal Declaration that “everyone has the right to life, liberty and security of person” and “the right to social security.” Particular rights concepts, however, have multiple defensible conceptions. Any particular conception, in turn, will have

¹⁹⁶ Jack Donnelly, ‘*The relative universality of human rights*’ (2007), p. 304.

¹⁹⁷ As cited in Richard A. Wilson (1997), p. 6.

¹⁹⁸ *Idem*, p. 8.

¹⁹⁹ John Rawls (1987).

²⁰⁰ Banu Kilan, ‘*J. Rawls’s idea of an ‘overlapping consensus’ and the complexity of ‘comprehensive doctrines’*’, 16 *Ethical perspectives - Katholieke Universiteit Leuven* 21 (2009), p. 23.

²⁰¹ Jack Donnelly, *Universal human rights in theory and practice* (2013), p. 96.

*many defensible implementations. At this level – for example, the design of electoral systems to implement the right “to take part in the government of his country, directly or through freely chosen representatives” – relativity is not merely defensible but desirable.*²⁰²

In conclusion, this (very brief – and, necessarily, incomplete) account of the clash between universalism and cultural relativism demonstrates that there is considerable room for compromise. It is possible to mitigate universalism with some features of cultural relativism, therefore acknowledging and honouring multiculturalism, without losing sight of the universal recognition of human dignity and of the rights that are directly associated with it. Mitigating radical universalism is indeed necessary in order to avoid cultural imperialism and Westernisation, but it cannot go so far as to negate the function of human rights as instruments for social justice, fairness and respect for human dignity.

7. Why cultural rights?

The last question that needs answering in this first chapter relates to why I chose cultural rights for the subject of this research. Cultural rights are, as demonstrated above, an underdeveloped category of human rights. In assessing the relationship between IIL and culture, most authors so far have focused on UNESCO's work regarding cultural heritage, with little space devoted to the human rights dimension.²⁰³ On the other hand, studies on the interaction between IIL and human rights often disregard (or pay very little attention to) cultural rights.²⁰⁴

The importance of cultural rights must not be underestimated. Human Rights treaty bodies correctly emphasise the role culture plays in the maintenance of peace and, in times like this, that role is more crucial than ever: with globalisation, mass migration, refugee crises, economic crises, extreme poverty, religious extremism and the fight against terrorism, the world needs, more than ever, to learn how to live in harmony and respect for cultural diversity and cultural pluralism. The speed at which technology has been developed, especially in terms of global communication, allows

²⁰² Jack Donnelly, *'The relative universality of human rights'* (2007), p. 299 (emphasis added, references omitted).

²⁰³ For example, see Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press 2014).

²⁰⁴ See, *inter alia*, Lorenzo Cotula (2012).

for an increasingly fast and intense contact between cultures. On the other hand, the threat to the mere existence of certain minority cultures is very real, with indigenous peoples becoming ever more Westernised and minority cultures feeling pressure to assimilate into the majority culture. A very grave example of this phenomenon is the tendency for languages to disappear – and languages are vehicles for culture, they are the way people decode, encode and understand their reality, their society, their values and beliefs. It is estimated that, by 2100, half of the languages in the world may completely disappear, taking entire cultures with them.²⁰⁵ For some communities, such as indigenous peoples, language is of incommensurable value; the extreme richness of oral tradition, expressed through stories, songs and even words that only exist for that specific group, risk complete annihilation.

In addition, the world is today, more than ever, concerned with economic interests, and places tremendous focus on foreign investment and trade. As Vadi eloquently puts it, '[a]n *international economic culture* has emerged that emphasizes productivity and economic development at the expense of the common weal.'²⁰⁶ The emphasis on economic interests very often threatens cultural rights.

Imagine the following scenario: indigenous peoples are more attached to the land than most other 'mainstream' cultures. They see the land and everything that nature offers as sacred, as the physical embodiment of their spirituality, as the living and breathing element of the stories they pass on from generation to generation. Some of these stories can only be told in specific places, representing both history and myth. Without access to their ancestral lands, indigenous peoples lose access to these stories and traditions, to the paths they used to walk, to the spiritual richness of their culture. Some of these traditions are only known to the group, as outsiders can be completely unaware of what constitutes a sacred path or a sacred place. On the other hand, traditional ways of life, including hunting and fishing, are also crucial elements of these peoples' culture. Indigenous peoples are often the most sustainable and environmentally conscious groups in the world, with their traditions imbued with respect for biodiversity and the conservation of fauna and flora. Now, imagine that one of these groups inhabits a land that is rich in natural resources, such as oil or diamonds. The territorial State is eager to exploit these natural resources and there

²⁰⁵ In this sense, see UNESCO's flyer on the Endangered Languages Programme, available at: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/FlyerEndangeredLanguages-WebVersion.pdf>.

²⁰⁶ Valentina Vadi (2014), p. 1.

are several foreign investors interested in joining in, either oblivious of the significance of that piece of land for the indigenous community, or plainly disregarding that significance in face of the potential economic profit. If the State decides to protect the integrity of the indigenous peoples' culture, and there is an IIA protecting those foreign investors, this may completely derail the mining project, risking liability under IIL; if the State ignores the threat to that culture (which can happen purposefully or not), it will honour its commitments to the foreign investors, but it will also potentially obliterate an entire culture. This type of conflict is not merely hypothetical; it is happening right now to the Standing Rock Sioux tribe, in the US, and to the indigenous peoples in Peace River Valley, in Canada. One can only imagine the number of similar situations happening in less developed countries, where there is less concern for the cultural rights of indigenous peoples and less media coverage.

Studying this conflict from the point of view of cultural heritage (tangible and intangible) is an interesting but necessarily incomplete exercise. The human right to culture is capable of encompassing the elements of heritage, but it goes well beyond it: the deep link with human dignity and cultural identity can only be fully grasped through the lens of HRL. Cultural rights also offer possibilities that the mere protection of cultural heritage does not; therefore, this research only makes sense if we look beyond representative lists and consider every culture precious, valuable and worthy of protection – regardless of official international recognition.

8. Conclusions

Establishing a conceptual framework for cultural rights is a difficult task, especially given the fact that definitions in this area have been considerably insufficient (either by fear of raising delicate issues or by the impossibility of reaching international consensus). This chapter has attempted to draw such a framework by explaining the concepts of culture and cultural rights, as well as the normative content and limitations of this category of human rights. In light of the above, it is possible to draw some conclusions.

First of all, the concept of culture is difficult to grasp and has been the subject of heated debate by scholars across disciplines, from legal and political theory to anthropology. At the level of international HRL, culture has come to be understood in its anthropological sense, as a way of life, encompassing 'the distinctive traits,

including the total spiritual, material, intellectual and emotional traits that characterise a society or social group, and that include, in addition to arts and literature, their value systems, and their traditions and beliefs'.²⁰⁷

The protection of cultural goods evolved from a national perspective which focused on monuments to an international and more holistic regime, which developed in consonance with the historical problems that emerged at each given time. There are specific conventions dealing with the protection of cultural heritage in times of war, in times of peace, regarding the preservation of tangible, intangible and underwater cultural heritage, as well as the return, restitution and repatriation of movable cultural goods and the prevention of illicit traffic, the effectiveness of which is controversial.

The interaction between cultural heritage law and HRL allowed for both the development of a more rounded conception of cultural goods (moving from 'property' to 'heritage'), as well as for the development of cultural rights, even though they remain largely unfinished and underdeveloped bodies of laws.

Cultural rights are true and enforceable human rights, intimately linked to human dignity and cultural identity. Their nature as human rights has been contested in the past, but literature, treaty language and international practice have become more and more open to the development of a right to culture. However, cultural rights are not absolute and their realisation depends on the state of economic development and available resources of each State, which influences the degree to which these rights are protected and promoted. Nevertheless, States have an immediate obligation to take positive measures to respect, protect and fulfil cultural rights, as well as to cooperate internationally with other States; violations of cultural rights by States and non-State entities entail State responsibility.

It is important to note that cultural rights can be (and are) exercised within the context of a group or community; therefore, there is a strong collective element to the enjoyment of the right to culture, which is recognised by the Committee on Economic, Social and Cultural Rights.

The debate between cultural relativists and universalists is old and, perhaps, 'tired' – but it is important to at least acknowledge the different perspectives. Cultural relativists consider that it is impossible to establish a universal set of values and

²⁰⁷ Preamble to the 2002 UNESCO Universal Declaration on Cultural Diversity.

beliefs against which an action can be judged as morally right or wrong, whereas universalists disregard cultural differences and argue that such a universal standard does indeed exist. A mitigated view of universalism, which takes into account cultural relativity, is ideal for a balanced understanding of human rights.

The importance of cultural rights in today's world is incommensurate. Not only is the pervasiveness of culture recognised more than ever, but there is also a growing concern for cultural diversity, cultural pluralism and the preservation of endangered cultures. The challenges to cultural rights are growing in relevance and dimension, as globalisation, mass migration, refugee crises, economic crises, extreme poverty, religious extremism and the fight against terrorism take a more prominent place within the concerns of the international community. Faced with these conclusions, it appears to be more important than ever to integrate HRL and cultural heritage law, so as to strengthen the protection afforded to culture under international law.

Chapter 2 – International Investment Law

In order to evaluate the relationship between international investment law and arbitration and cultural rights, it is necessary, first of all, to understand what each of them mean. In the previous chapter, I have analysed the conceptual framework within which cultural rights can be understood; in this chapter, I will succinctly explore what IIL entails.

Accordingly, this chapter will first seek to briefly introduce IIL in terms of goals, sources and main features (Section 1). Next, it will determine the typical content of IIAs, namely: investment promotion, admission and establishment of foreign investment, post-entry treatment of foreign investment (including relative and absolute standards of treatment, takings of foreign investors' property and transfer of funds), performance requirements and, finally, dispute settlement (Section 2). Some conclusions will follow.

1. Foreign investment and international investment law

IIL is a significant part of public international law, with roots in the protection of foreign-owned property that developed from the 17th century onwards.²⁰⁸ Modern IIL aims at protecting foreign investment and investors from harmful actions of the host State, with the objective of promoting international investment flows.²⁰⁹ It provides for a number of both procedural and substantial mechanisms that ensure the protection of foreign investors, chiefly through the possibility of investor-State arbitration – which means that IIL actually recognises the investor as an international actor with legal standing. The main channel for these developments was the gradual establishment of a large network of IIAs, most notably Bilateral Investment Treaties (hereinafter, 'BITs'), which started off as instruments regulating the relationship between Western countries and developing countries (the first ever BIT to appear in history was

²⁰⁸ A full account of the historical evolution of IIL is outside the scope of this research. For a complete view, see M. Sornarajah, *The International Law on Foreign Investment* (Third edn, Cambridge University Press 2012), chapter 2.

²⁰⁹ Lorenzo Cotula (2012), p. 57.

concluded between Germany and Pakistan in 1959; the first BIT to include investor-State arbitration was signed by France and Tunisia in 1969). Progressively, however, developing countries started to enter these agreements between them, and the same is true of Western countries amongst themselves. Throughout this process, a conflict of interests became apparent, with capital-exporting countries defending a protection regime that entailed significant constraints on national sovereignty, whereas host States emphasised national control of foreign investment with minimal constraints. The presence of conflicts such as this one is what stimulates the constant evolution and development of IIL.²¹⁰ More recently, though, it is possible to affirm that most countries – developing or not – now accept the existence of treaty-based protection standards.²¹¹ Modern BITs have considerable differences, but the essence of the protection regime they establish is largely similar throughout the world, which, for some commentators, reflects the existence of global rules on foreign investment.²¹²

Even though there were several efforts towards the creation and implementation of a formal global investment regime – notably, from Western States – this development never did take place.²¹³ The fragmentation of IIL into thousands of IIAs (some bilateral, some regional and some multilateral), prompted by economic globalisation and the expansion of MNEs, still raises concerns, namely contributing to ‘confusion, legal conflict, and uncertainty’ and creating an incentive for treaty shopping.²¹⁴

Under modern IIL, foreign direct investment (FDI) may be defined as a commitment of any asset bearing economic value, which serves to establish or maintain stable, lasting and direct links between the investor and the undertaking to which that asset is made available in order to carry out an economic activity. The investor must possess the ability of controlling or influencing the management of the undertaking. Portfolio investment, on the other hand, presents a purely financial character, where the investor does not possess managerial control of the investment. Concession

²¹⁰ In this sense, see, *inter alia*, M. Sornarajah (2012), p. 33.

²¹¹ Peter Muchlinski (2008), ‘Policy Issues’ in Peter Muchlinski et al. (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), p. 4.

²¹² See Stephan W Schill, *The multilateralization of international investment law* (Cambridge University Press 2009).

²¹³ For a detailed analysis of the efforts geared towards the creation of a multilateral investment regime, see Stephan W Schill (2009); Stefan D Amarasingha and Juliane Kokott, ‘Multilateral Investment Rules Revisited’ in Peter Muchlinski et al. (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008); M. Sornarajah (2012), pp. 236-275; Christopher Dugan et al. (2011), *Investor-State Arbitration* (Oxford University Press 2011), pp. 45-50; and Rafael Leal-Arcas, ‘The Multilateralization of International Investment Law’, 35 North Carolina Journal of International Law and Commercial Regulation 33 (2009).

²¹⁴ Rafael Leal-Arcas (2009), p. 134.

contracts are agreements concluded in writing between the investor and one or more State authorities, having as their object the execution of works or the provision of services, where the consideration consists either solely in the right to exploit the work or service or in this right together with payment, and the risk is transferred to the service provider or contractor.

It is also important to mention the sources of IIL. These include, first and foremost, international investment treaties (including BITs, regional and multilateral treaties); international customary law; general principles of law; and judicial decisions (a subsidiary source, since, although there is no formal rule of precedent, tribunals are likely to draw inspiration from and comply with previous awards – leading some commentators to affirm that there is a *de facto* practice of precedent).²¹⁵ It should also be noted that, although not constituting formal sources, IIL is also influenced by scholarly writings and soft law norms.²¹⁶

2. The scope of international investment agreements

IAs entail the assumption of commitments by the contracting parties regarding each other's investors and investments. They also provide for enforcement instruments,²¹⁷ which generally include the possibility of settling disputes through arbitration. This is valid for BITs, as it is for investment chapters in Free Trade Agreements (FTAs), all of which invariably start off by defining their scope of application. The concepts of investor and investment are therefore vital to the determination of the coverage of IAs. In substantive terms, most IAs contain several common elements, namely: provisions on the conditions of admission and establishment of foreign investment; the conditions of operation and the protection accorded to covered investors and investments, including expropriation; repatriation of profits; and dispute settlement.²¹⁸ In addition, most IAs contain obligations to promote investment among the contracting parties.

²¹⁵ For a more detailed discussion of the sources of IIL, see Moshe Hirsch, '*Sources of international investment law*' International Law Association Study Group on the Role of Soft Law Instruments in International Investment Law (2011).

²¹⁶ *Idem*, p. 21-23.

²¹⁷ See Jeswald W. Salacuse (2010).

²¹⁸ Cf., *inter alia*, Andrew Paul Newcombe and Luis Paradell (2009), pp. 65 and following; M. Sornarajah (2012) pp. 187 and following.

2.1. Investment promotion

Investment promotion does not in principle entail any obligation of liberalisation.²¹⁹ In fact, it should be pointed out that investment promotion and liberalisation constitute two distinct objectives of IIAs. It is understood that, by establishing a foreign investment regime which is characterised by stability, predictability and reliability, the contracting parties are implicitly encouraging investment. In the words of Salacuse and Sullivan, '[t]he basic working assumption upon which BITs rest is that clear and enforceable rules that protect foreign investors reduce risk, and a reduction in risk promotes investment.'²²⁰ It is not expected, however, that IIAs themselves contain legally binding clauses providing for the specific encouragement (or prioritisation) of investment from one contracting party to the other. In effect, most IIAs condition the investment promotion objective to national laws and connect it with inward investments, rather than outward.²²¹ Nevertheless, the wording of these provisions provides valuable interpretative guidance for other clauses inserted in IIAs, such as those referring to standards of protection; furthermore, they may arguably give rise to specific constraints on State action.²²² It is questionable, however, whether the same specific constraints would not flow from the IIA without the need for an investment promotion clause. The lack of arbitral awards on this matter renders its assessment less evident.

Even though binding investment promotion provisions are absent from most IIAs, States have the possibility of adopting specific investment promotion measures, which are generally unilateral²²³ and may range from risk insurance and tax incentives/exemptions to technical support.

2.2. Admission and establishment of foreign investment

As to the conditions of admission/entry and establishment of foreign investment, it should be noted that the majority of IIAs does not provide a general right of entry to

²¹⁹ Cf. Andrew Paul Newcombe and Lluís Paradell (2009), pp. 125-8.

²²⁰ Jeswald W Salacuse and Nicholas P Sullivan, '*Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain*', 46 Harv Int'l LJ 67 (2005), p 95.

²²¹ Andrew Paul Newcombe and Lluís Paradell (2009), pp. 125-6. The authors point out, at p. 127, that some BITs contain investment promotion provisions which are specifically directed to outward FDI. These cases, however, are not representative of the majority of IIAs.

²²² Andrew Paul Newcombe and Lluís Paradell (2009), at p. 127.

²²³ M. Sornarajah (2012), p. 144.

foreign investors. Traditionally, the entry conditions for foreign investment have been considered an area of sovereign discretion of the States, since they correspond to the right recognised under customary international law to control the admission and establishment of foreigners in a State's territory.²²⁴ Regardless, it is increasingly common to find provisions in IIAs that establish the right of free entry and establishment for foreign investors, constituting treaty-based limitations to the customary international law principle.²²⁵ The adoption of this type of clauses is intrinsically connected to the context of economic globalisation and to the generalised acknowledgement of the benefits that foreign investment brings to host economies.

Entry and establishment are two different concepts that should be distinguished. The first concerns the permission for alien investors to cross the border into the host country (which may be temporary or permanent), whereas the latter is related to the 'type of presence'²²⁶ that they are allowed to adopt in that territory.

Several IIAs provide for reciprocity, even if in varying degrees.²²⁷ The most relevant of these agreements is the General Agreement on Trade in Services (GATS), which covers certain aspects of investment under mode 3 of supply of services (commercial presence) and mode 4 (temporary entry of natural persons).²²⁸ By providing for Most-Favoured Nation (MFN) treatment²²⁹ and National Treatment (NT) in specific sectors,²³⁰ it concerns both entry and establishment conditions for foreign investors.²³¹

Another IIA worth mentioning in this regard is the Energy Charter Treaty (ECT), signed in Lisbon in December 1994 and in force since April 1998,²³² which comprises

²²⁴ Cf. UNCTAD, *International Investment Agreements: Key Issues, Volume I* (UNCTAD/ITE/IIT/2004/10) (2004), pp. 143 and following; and Walid Ben Hamida, 'Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of their Investments under Investment Agreements', 9 *Law & Prac Int'l Cts & Tribunals* 17 (2010), p. 31.

²²⁵ UNCTAD, *International Investment Agreements: Key Issues, Volume I* (2004), p. 146. An example of a more modern market access provision can be found in Article 8.4 of the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union and Its Member States, available at: <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf>.

²²⁶ *Ibidem*.

²²⁷ See Angelos Dimopoulos, *EU foreign investment law* (Oxford University Press 2011), p. 51.

²²⁸ See Article I(2)(c) and (d), and XXVIII(d) GATS.

²²⁹ See Article II GATS.

²³⁰ See Articles XVI and XVII GATS.

²³¹ For an analysis of the investment rules in the context of the WTO, see Thomas L Brewer and Stephen Young, 'Investment issues at the WTO: The architecture of rules and the settlement of disputes', 1 *Journal of International Economic Law* 457 (1998).

²³² And recently updated, through *The International Energy Charter*, a further political declaration adopted and signed in The Hague on 20 May 2015 (available at: http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_EN.pdf).

a multilateral framework for investments in the energy sector. According to the Energy Charter Secretariat, one of the main objectives of the ECT ‘is to ensure the creation of a “level playing field” for energy sector investments throughout the Charter’s constituency, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments.’²³³

The ECT’s relevance comes both from its unprecedented coverage in geographical terms and from its originality. In fact, not only is it the only legally binding multilateral instrument on energy issues and investment protection, but it also involves a large number of countries around the world, either through membership or through the status of observers.²³⁴ The ECT contains several provisions relevant to the liberalisation of investment in the energy sector, namely those guaranteeing freedom of capital transfers, subject only to very limited restrictions, and those providing for non-discrimination of foreign investors, granting them NT or MFN treatment, whichever is more favourable.²³⁵

The provisions on admission and establishment are not, however, as strong and precise as the ones relating to post-entry protection. As Konoplyanik and Wälde point out, as the ECT stands now, it contains ‘softer’ rules for pre-entry conditions and ‘harder’, legally binding obligations for the post-entry phase.²³⁶ The ECT members were nevertheless discussing the possibility of adopting a Supplementary Treaty covering the ‘Making of Investments’ phase. The negotiation process was initiated in 1996, but subsequently put on hold, in 2002, while the discussions for a multilateral investment agreement were taking place at the WTO level. It was never resumed since,²³⁷ although the Energy Charter Conference, in 2004, reaffirmed the will to engage in the matter.²³⁸

Finally, it is important to mention the OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations (the ‘OECD Codes’). These Codes

²³³ See Energy Charter Secretariat, ‘An Introduction to the Energy Charter Treaty: Why an Energy Charter?’ (D/2004/7850/5) (2004), p. 14.

²³⁴ At the time of writing, 52 countries are members of the ECT (4 of which still have not ratified it), as well as the EU and Euratom (which adds up to 54 signatories) and 24 countries are observers; there are also several international organisations with observer status, including the WTO and the OECD. The International Energy Charter (a political declaration) already has over 70 signatories.

²³⁵ Cf. Articles 10 and 14 ECT.

²³⁶ See Andrei Konoplyanik and Thomas Wälde, ‘Energy Charter Treaty and its role in international energy’, 24 J Energy Nat Resources L 523 (2006), p. 533.

²³⁷ Cf. Energy Charter Secretariat (2004), p. 14.

²³⁸ In particular, see paragraph 14 of the Conclusions of the Review conducted under Article 34(7) of the Energy Charter Treaty (15th Meeting, on 14th December 2004), available at: <http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC200408.pdf>.

aim at the progressive abolition of restrictions on movements of capital, as well as on current invisible transactions and transfers, to the extent necessary for effective economic co-operation.²³⁹ There are no sanctions for non-compliance with the OECD Codes and their enforcement relies basically on 'peer pressure'; however, the OECD reports that the 'peer review process has proved to be quite a powerful tool for driving liberalisation forward, even though it does not involve direct negotiations and sanctions.'²⁴⁰

2.3. Post-entry treatment of foreign investment

After the investor enters the host country, there are still many aspects of his activity that may be regulated in a manner that conditions its exercise, e.g., 'measures related to non-discrimination, nationalization or expropriation, capital transfer, dispute settlement, performance requirements, corporate tax rates and other measures affecting the operating conditions for [MNEs]'.²⁴¹ The most relevant features of the post-entry treatment of foreign investment under IIL will be briefly analysed below.

a) Relative and absolute standards of treatment

Most IIAs provide for the non-discriminatory treatment of foreign investors and investments after they are established in the host country, generally with regard to nationality. Non-discrimination can be required both in relation to national investors and to other foreign investors: it corresponds to the obligations of NT and MFN treatment.

NT and MFN treatment obligations do not set objective standards regarding how foreign investors should be allowed to conduct their activities in the host country. On the contrary, they set a relative standard which triggers a comparison between the treatment accorded to the foreign investor, on the one hand, and similarly situated host state nationals or foreign investors, on the other. The host country may not treat the foreign investor in a manner less beneficial than it would one of the comparable

²³⁹ Cf. Article 1(a) of each Code, both available at: <http://www.oecd.org/investment/investment-policy/codes.htm>.

²⁴⁰ Cf. 'Forty Years' Experience with the OECD Code of Liberalisation of Capital Movements' (OECD, 2002), p. 58, available at: <https://www.oecd.org/investment/investment-policy/2510947.pdf>.

²⁴¹ UNCTAD, World Investment Report 2011: Non-Equity Modes of International Production and Development (UNCTAD/WIR/2011) (2011), p. 95.

individuals or legal persons. As an example, BITs concluded by EU Member States do not contain entry rules; consequently, NT and MFN clauses typically address post-entry issues,²⁴² i.e., treatment of foreign investors and investments after they are already established in their territory.²⁴³ Accordingly, the UK Model BIT specifies that NT and MFN treatment apply to ‘investments or returns of nationals or companies’ and ‘their management, maintenance, use, enjoyment or disposal of their investments’.²⁴⁴

Post-entry provisions are, however, not limited to obligations of non-discrimination. Most BITs include absolute standards of treatment, namely Fair and Equitable Treatment (FET) and/or Full Protection and Security (FPS). Under Articles 2(2) and 4(1) of the German Model BIT, foreign investments are accorded both FET and FPS; the UK Model BIT contains the same solution;²⁴⁵ the French Model BIT, on the other hand, only establishes an obligation of FET.²⁴⁶

FET is not defined in the majority of IIAs. This notwithstanding, it is evident from international arbitral awards that this obligation is far-reaching and includes both substantive and procedural issues. According to Vandevelde, this standard of treatment is intrinsically connected with the rule of law; in the author’s words, ‘the concept of legality is the unifying theory behind the fair and equitable treatment standard’.²⁴⁷ This has consequences both on procedural (as an obligation of due process) and substantive matters (as requiring reasonableness, consistency, non-discrimination and transparency from the host State’s part).²⁴⁸

The obligation of FPS is very often interpreted together with FET and sometimes even diluted in it. Nevertheless, this standard should be given an autonomous meaning as imposing ‘a high degree of diligence expected from a well-administered government’.²⁴⁹ In international arbitral awards, consideration has been given to the

²⁴² See Article 3 of the Federal Republic of Germany Model Treaty concerning the Encouragement and Reciprocal Protection of Investments (2008), hereinafter ‘German Model BIT’; as well as Article 3 of the UK Model Agreement on the Promotion and Protection of Investments (2005, with 2006 amendments), reproduced in Zachary Douglas (2009), appendix 10, hereinafter ‘UK Model BIT’; and Article 4 of the Republic of France Model Agreement on the Reciprocal Promotion and Protection of Investments (2006), hereinafter ‘French Model BIT’.

²⁴³ Jan Ceyssens (2005), p. 264.

²⁴⁴ Cf. Article 3 of the UK Model BIT.

²⁴⁵ Article 2(2) of the UK Model BIT.

²⁴⁶ Article 3 of the French Model BIT.

²⁴⁷ Kenneth J Vandevelde, ‘A unified theory of fair and equitable treatment’, 43 *New York University Journal of International Law and Politics* (JILP) 43 (2010), p. 49.

²⁴⁸ *Idem*, pp. 49-53.

²⁴⁹ Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?* (International Institute for Sustainable Development 2011), p. 11.

specific conditions of the State granting FPS in a way that the standard was envisaged as an obligation of '*diligentia quam in suis*' or 'level of care that one applies in one's own affairs'.²⁵⁰ Traditionally, this standard of treatment has been associated with the physical protection of investors and investments, although some arbitral awards seem to confirm the view that FPS extends to regulatory interference with foreign investment, thus going beyond the traditional approach.²⁵¹

b) Takings of foreign investors' property

The post-entry treatment of foreign investors also covers the matter of takings. This concept encompasses two kinds of interference with foreign investors' property by the host country: direct ('legislative or administrative acts that transfer title and physical possession') and indirect takings ('acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of assets').²⁵² In general, the concepts of expropriation and nationalisation fit into the first category, whereas the second refers to indirect/creeping expropriation and regulatory takings.²⁵³ The usage of these terms varies significantly both in the wording of treaty provisions, arbitral awards and literature, despite the fact that countless takings have been under scrutiny for decades. This lack of uniformity is attributed to several factors, namely the fact that the term usually stems from varying national legislation, which in turn experiences changes in interpretation and application throughout time, as policies and ideologies mutate, as well as the fact that international practice has been characterised by a succession of different phases regarding host State action and corresponding reaction in international arbitration fora.²⁵⁴ For the purpose of this research, the term 'expropriation' will be used generically to refer to all host country takings of foreign investors' property.

²⁵⁰ Andrew Paul Newcombe and Lluís Paradell (2009), p. 309.

²⁵¹ For a review of these awards, see Mahnaz Malik (2011), pp. 7-9.

²⁵² UNCTAD, *International Investment Agreements: Key Issues, Volume I* (2004), p. 236.

²⁵³ The definition of takings and the distinction between direct and indirect takings, as well as the determination of what constitutes a compensable interference with foreign investors' property are very interesting and complex questions. However, they will not be explored in this research, as they go beyond its scope. In this regard, see, *inter alia*, George C Christie, 'What Constitutes a Taking of Property Under International Law', 38 Brit YB Int'l L 307 (1962); Maurizio Brunetti, 'The Iran-United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation', 2 Chi J Int'l L 203 (2001); Allen S Weiner, 'Indirect Expropriations: The Need for a Taxonomy of "Legitimate" Regulatory Purposes' (2003) International Law FORUM du droit international, available at: ; Christoph H Schreuer, 'The Concept of Expropriation under the ECT and other Investment Protection Treaties' in Clarisse Ribeiro (ed), *Investment Arbitration and the Energy Charter Treaty* (Juris Publishing 2006).

²⁵⁴ UNCTAD, *International Investment Agreements: Key Issues, Volume I* (2004), p. 237.

It is commonly accepted that expropriation is not forbidden, which is not the same as saying that it is allowed to occur without fulfilling certain requirements. For example, the majority of the BITs concluded by EU Member States require, in line with the most common international practice,²⁵⁵ the fulfilment of four requirements in order to consider an expropriatory measure as lawful: it must (1) pursue the public interest; (2) be non-discriminatory; (3) be exercised with respect to due process; and (4) provide for prompt, adequate and effective compensation. It should be noted that early instruments, such as the 1959 Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention), which is regarded as one of the most important non-governmental attempts to establish a multilateral agreement on foreign investment, already referred to these requirements.²⁵⁶ The OECD Draft Convention on the Protection of Foreign Investment, arguably an influential model for BITs concluded by OECD countries, contained all four requirements mentioned above.²⁵⁷

There is much debate as to the standard of compensation that should be applied to cases of expropriation of foreign investors' property. The tendency among capital exporting countries has traditionally been to follow the Hull formula, named after the US Secretary of State Cordell Hull, which requires 'prompt, adequate and effective' compensation.²⁵⁸ Hull employed this expression in a communication regarding the Mexican expropriations which reflected the idea that expropriation was not illegal *per se* and that compensation could be viewed as a necessary *ex post* requirement, rather than an *ex ante* condition of lawfulness. Capital importing countries – traditionally, developing countries – showed reluctance to accept the Hull formula, which was viewed as imposing too high a standard and possibly fettering their regulatory freedom.²⁵⁹

²⁵⁵ These four requirements are explicitly enumerated, e.g., in Article 1110(1) NAFTA; the same occurs in Article 13(1) ECT.

²⁵⁶ 1959 Draft Convention on Investments Abroad, in UNCTAD, 'International Investment Instruments: A Compendium', no. 137, vol. V – cf. Article III, expressly referring to due process, non-discrimination and prompt, just and effective compensation.

²⁵⁷ Cf. Article 3 of the OECD Draft Convention on the Protection of Foreign Investment (1968), 7 ILM 117

²⁵⁸ Andrew Paul Newcombe and Lluís Paradell (2009), p. 376; Kommerskollegium (Swedish National Board of Trade) (2011), p. 23.

²⁵⁹ In this sense, UNCTAD, *International Investment Agreements: Key Issues, Volume I* (2004), p. 237; M. Sornarajah (2012), p. 414; Andrew Paul Newcombe and Lluís Paradell (2009), p. 376; Kommerskollegium (Swedish National Board of Trade) (2011), p. 23.

c) Transfer of funds

It is commonly accepted that a foreign investor can only fully enjoy the outcome of his enterprise if the host State allows for the free transfer of funds.²⁶⁰ In fact, the possibility for the investor to mobilise capital (both inwards and outwards) is a fundamental component of the foreign investment process. The high importance of free transfer of funds is reflected in the attention to these issues expressed at the IIL level since early stages.

A good example of this concern is the inclusion of provisions establishing the free transfer of funds in instruments such as the International Monetary Fund (IMF) Articles of Agreement (the 'IMF Articles'), adopted in 1944,²⁶¹ and the International Chamber of Commerce (ICC) International Code of Fair Treatment for Foreign Investments (the 'ICC Code'), proposed in 1949,²⁶² which never entered into force due to the fact that States did not wish to adopt such a far-reaching agreement on investment.²⁶³ Its influence on the evolution of international approaches to investment protection is nonetheless undeniable.

The OECD Codes,²⁶⁴ mentioned above in 2.2, contain binding free transfer obligations, which provide for more comprehensive protection than the IMF Articles. The GATS also contains free transfer commitments, albeit restricted to the services sector.²⁶⁵ IIAs commonly liberalise inward transfers but not outward transfers.

As to the ECT, Article 14(1) provides for free transfer of funds, both inward and outward, with the sole exception of measures adopted with a view to protecting 'the rights of creditors', ensuring 'compliance with laws on the issuing, trading and dealing in securities' and guaranteeing the 'satisfaction of judgments (...) through the equitable, non-discriminatory, and good-faith application of its laws and regulations'.²⁶⁶

²⁶⁰ UNCTAD, *International Investment Agreements: Key Issues, Volume I* (2004), p. 257.

²⁶¹ Articles of Agreement of the International Monetary Fund (1944), republished in 2011, available at: <http://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf>.

²⁶² ICC 'International Code of Fair Treatment for Foreign Investment', Brochure 129 (1949, Lecraw Press); reprinted in UNCTAD, *International Investment Instruments: A Compendium* (1996), vol. 3, pp. 273 *et seq.*, available at: <https://international-arbitration-attorney.com/wp-content/uploads/73-volume-3.pdf>.

²⁶³ *Idem*, pp. 20-21.

²⁶⁴ See Section 2.2. above.

²⁶⁵ Cf. Articles XI(1) and XVI GATS, fn. 8.

²⁶⁶ Cf. Article 14(4) ECT.

2.4. Performance requirements

One of the ways in which the host State exercises control over foreign investment in its territory is through the imposition of certain requirements on the performance of economic activities, such as local content obligations and rules relating to minimum export levels. Performance requirements may be underpinned by various policy goals, ranging from environmental protection to employment of nationals and protection of local businesses, and they have the potential to affect both the entry and the operation of foreign investment. Whilst there is huge debate over the economic admissibility or desirability of performance requirements,²⁶⁷ international instruments have consistently reflected the view that such provisions are detrimental to the efficiency of foreign investment. Accordingly, the 1992 World Bank (WB) Guidelines on the Treatment of Foreign Direct Investment (the 'WB Guidelines') emphatically state that:

*In the formulation and application of (...) regulations [to govern the admission of private foreign investments], States will note that experience suggests that certain performance requirements introduced as conditions of admission are often counterproductive and that open admission, possibly subject to a restricted list of investments (which are either prohibited or require screening and licensing), is a more effective approach.*²⁶⁸

Within the WTO, a number of performance requirements are regulated under the Agreement on Trade-Related Investment Measures (the 'TRIMs Agreement'), which originated in the 1986-1994 Uruguay Round of Multilateral Trade Negotiations.²⁶⁹ As highlighted in its preamble, the TRIMs Agreement aimed 'to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition'. Its scope of application is limited, however, to trade in goods²⁷⁰ and to specific performance requirements, which it does not define. It does contain an 'illustrative list' of prohibited

²⁶⁷ Andrew Paul Newcombe and Lluís Paradell (2009), pp. 416-418.

²⁶⁸ World Bank, 'Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment' (1992), 31 ILM 1363, Guideline II(3).

²⁶⁹ 'Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' (1994), Legal Instruments – Results of the Uruguay Round, vol. 1, 33 ILM 9.

²⁷⁰ Cf. Article 1 of the TRIMs Agreement (1994), 'Marrakesh Agreement Establishing the World Trade Organization' (1994), Annex 1A, in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, GATT Sales No. 1994-4, also available at <http://www.wto.org>.

measures, including local content rules (e.g., the obligation for foreign investors to 'purchase or use (...) products of domestic origin or from any domestic source'),²⁷¹ foreign exchange restrictions ('restricting [the foreign investor's] access to foreign exchange to an amount related to the foreign exchange inflows attributable to [him]')²⁷² and trade balancing obligations (e.g., limitation of the purchase or use of imports by reference to exports of local products).²⁷³

The TRIMs Agreement has been criticised in legal literature as unsuitable to achieve its own goals, as it arguably did not succeed in going beyond what already resulted from the GATT,²⁷⁴ as well as for excessively fettering the regulatory freedom of developing countries.²⁷⁵ Conversely, it has been praised for bringing investment matters onto the WTO agenda.²⁷⁶ The TRIMs Agreement should not be viewed as a code intended to liberalise admission of foreign investment, but rather as a clarification of which performance requirements are incompatible with the GATT's rules on NT and prohibition of quantitative restrictions.²⁷⁷

At the WTO level, there are further prohibitions of performance requirements. Under Article XVI(2) of the GATS, whenever a member undertakes market access commitments, it must abstain from adopting measures which limit the number of service suppliers, the value of service transactions or assets, the number of service operations or the quantity of service output, the number of employees, the level of participation of foreign capital and the legal form of the entity supplying the service.

The ECT also contains a prohibition of certain performance requirements. Article 5(2) textually replicates the wording of the Annex to the TRIMs Agreement, thus prohibiting the same type of measures. Moreover, under Article 10(11), the application of performance requirements to existing investments constitutes a breach of an ECT obligation. It is interesting to note, however, that Article 5(3) excludes from the prohibition those measures requiring use or purchase of domestic products, or

²⁷¹ Article 1(a) of the Annex to the TRIMs Agreement.

²⁷² *Idem*, Article 2(b).

²⁷³ *Idem*, Articles 1(b) and 2.

²⁷⁴ In this sense, see Paul Civello, 'The TRIMs Agreement: A Failed Attempt at Investment Liberalization', 8 Minn J Global Trade 97 (1999), pp. 107-109; Kevin C Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem', 24 U Pa J Int'l Econ L 77 (2003), pp. 135-140.

²⁷⁵ Cf. Rupert Schlegelmilch, 'WTO: Why Still No Multilateral Rules for Foreign Direct Investment?', 6 International Trade Law and Regulation 78 (2000), p. 82.

²⁷⁶ Scott S Quillin, 'The World Trade Organization and Its Protection of Foreign Direct Investment: The Efficacy of the Agreement on Trade-Related Investment Measures', 28 Okla City UL Rev 875 (2003), p. 889.

²⁷⁷ Andrew Paul Newcombe and Lluís Paradell (2009), pp. 419-20.

restricting levels of imports in accordance with the investor's levels of exports of local products, 'as a condition of eligibility for export promotion, foreign aid, government procurement or preferential tariff or quota programmes'.

Finally, it should be noted that NT provisions have the potential to indirectly apply as a prohibition of performance requirements, by preventing the imposition on foreign investors of measures that would not be imposed equally on the host State's nationals. Nonetheless, as NT is not always granted in a comprehensive manner (and sometimes its application to this kind of measures is even expressly excluded), it cannot be regarded as a sufficiently efficient instrument of protection from host States' interference with the conditions of admission and operation of FDI.

2.5. Dispute settlement

Vattel stated, in 1758, that '[w]hoever ill-treats a citizen indirectly injures the State, which must protect that citizen.'²⁷⁸ This 18th century idea was rooted in the assumption that 'the individual had no rights at international law'.²⁷⁹ In line with this principle, historically, the settlement of international investment disputes between private parties and States occurred in the context of diplomatic protection,²⁸⁰ whereby the State of the investor's nationality would espouse his claim. The International Law Commission (ILC), in Article 1 of its Draft Articles on Diplomatic Protection, drew inspiration from the customary international law concept, in defining diplomatic protection as '[t]he invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.'²⁸¹

This definition was also endorsed by the ICJ, namely in the *Diallo* case.²⁸² Moreover, in 1924, the right of a State to exercise diplomatic protection on behalf of its nationals

²⁷⁸ Emmerich De Vattel, *The Law of Nations or the Principles of Natural Law* Book II (1758), in C Fenwick (trans.), Legal Classics Library (Carnegie Institution of Washington, 1916), paragraph 71.

²⁷⁹ Chittharanjan Felix Amerasinghe, *Diplomatic protection* (Oxford University Press 2008), p. 79.

²⁸⁰ August Reinisch and Loretta Malintoppi, 'Methods of Dispute Resolution' in Peter Muchlinski et al. (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), pp. 692, 712-714.

²⁸¹ ILC 'Report on the work of its fifty-eighth session', in Report of the International Law Commission, UN Doc A/61/10 (2006), p. 16.

²⁸² *Guinea v. Democratic Republic of the Congo*, Preliminary Objections, General List No 103, ICJ Judgment, 24 May 2007, paragraph 39.

was very expressively characterised by the Permanent Court of International Justice (PCIJ), in the *Mavrommatis* case, as ‘an elementary principle of international law.’²⁸³

While this right is generally undisputed, the question of whether diplomatic protection also constitutes a duty imposed on the States remains the subject of intense debate.²⁸⁴ In addition, under customary international law, whenever a foreign investor wishes to bring a claim against the host State, he is required to resort, first and foremost, to the national judicial system of that State. Only when local remedies have effectively been exhausted may the foreign investor seek diplomatic protection from his State of origin. Diplomatic protection often came accompanied with threats or use of force (the so-called ‘gun-boat diplomacy’)²⁸⁵ and there was an early practice of setting up *ad hoc* claims commissions and arbitral tribunals, although generally not granting actual standing to the foreign investor. The intervention of private parties in investment dispute settlement mechanisms evolved progressively, and the first international instrument that expressly provided for direct investor-State arbitration was the 1959 Abs-Shawcross Draft Convention.

It is commonly accepted that there is a principle of ‘free choice of means’ applicable to the international settlement of disputes.²⁸⁶ This principle has been expressed in several international instruments, most notably the UN Charter.²⁸⁷ In line with this principle, States have traditionally resorted to a wide range of dispute settlement options, including both bilateral and third-party mechanisms. The latter, most notably arbitration, only became common for the settlement of investment disputes in the ‘post-1945 Friendship, Commerce and Navigation treaties’ period.²⁸⁸ Historically, most inter-State disputes were settled by resorting to bilateral mechanisms, such as negotiations and consultations.

The first and most obvious example of multilateral inter-State dispute settlement is the WTO, under which a Dispute Settlement Body (DSB) constituted by representatives of all members is in charge of the proceedings. These comprise two

²⁸³ *The Mavrommatis Palestine Concessions, Greece v UK* (1924) PCIJ Ser. A, No. 2, p. 12, available at: http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf.

²⁸⁴ For more on the subject, see Chittharanjan Felix Amerasinghe (2008), pp. 79-90.

²⁸⁵ Cf. Andrew Paul Newcombe and Lluís Paradell (2009), pp. 5-10.

²⁸⁶ For a detailed account of this issue, see UN, Handbook on the Peaceful Settlement of Disputes between States (OLA/COD/2394, Sales No. E.92.V.7) (1992), available at: <http://www.un.org/law/books/HandbookOnPSD.pdf>.

²⁸⁷ See Article 33 of the 1945 Charter of the United Nations, available at: <http://www.un.org/en/charter-united-nations/>.

²⁸⁸ See UNCTAD, Dispute Settlement: State-State (UNCTAD/ITE/IIT/2003/1) (2003), p. 25.

stages, the first corresponding to a panel and the second to the Appellate Body (AB), which decides on appeals from the panel's report. Although the WTO dispute settlement mechanism was born from a 'diplomatic paradigm', after the Uruguay Round it became a 'system that is based on third and impartial bodies, which shifted the adjudicatory function partially away from and beyond the WTO members.'²⁸⁹ The popularity of the WTO dispute settlement system among its members is clear evidence of its effectiveness and importance. In fact, it is argued that, among other factors, 'by creating a system of compulsory, binding and enforceable dispute settlement' the WTO 'significantly reshaped the world trading system'.²⁹⁰

With regard to ISDS, it was only after the establishment of the ICSID, in 1966, that international investment arbitration fully presented itself as an option for non-State parties. Accordingly, it has been frequently noted in legal literature that '[i]t was only during the 1990s that investment arbitration clearly emerged as an international mechanism of adjudicative review.'²⁹¹ This was connected both to the rapid proliferation of BITs and to the conclusion of important regional treaties covering investment matters and providing for arbitration, such as the NAFTA and the ECT.

In fact, the ECT presents a complex and innovative solution, by providing both for inter-State and investor-State dispute settlement mechanisms. Pursuant to part V of the ECT, private investors are entitled to submit disputes to international arbitration, in accordance with the principles laid out in Article 26. Furthermore, under Article 27, States are invited to settle their disputes through diplomatic channels, but are also granted the right to resort to an *ad hoc* tribunal governed, in principle, by the UNCITRAL Arbitration Rules.²⁹² It should be noted that the latter mechanism is not limited to investment matters, but rather covers all issues concerning the application or interpretation of the ECT.²⁹³

Regarding inter-State arbitration, the UK, German and French Model BITs all contain very similar provisions. Disputes between the parties should firstly be settled through

²⁸⁹ Barbara Marchetti, 'The WTO Dispute Settlement System: Administration, Court, or Tertium Genus', 32 *Suffolk Transnat'l L Rev* 567 (2008), p. 6.

²⁹⁰ Simon Lester et al., *World Trade Law: Text, Materials and Commentary* (Hart Publishing 2008), p. 153.

²⁹¹ Gus Van Harten and Martin Loughlin, 'Investment treaty arbitration as a species of global administrative law', 17 *European Journal of International Law* 121 (2006), pp. 123-124.

²⁹² UN Commission on International Trade Law (UNCITRAL), 'Arbitration Rules as revised in 2010'; cf. Resolution no. 65/22 adopted by the General Assembly on the report of the Sixth Committee (A/65/465).

²⁹³ Article 27(1) of the ECT; see also Kaj Hobér, 'Investment arbitration and the energy charter treaty', 1 *Journal of International Dispute Settlement* 153 (2010).

diplomatic channels; in case this fails, it is possible to resort to international arbitration, each party being entitled to appoint one member of the tribunal and a third being appointed by the first two. If any of these appointments is not properly made within the timeframes set in the BITs, the parties may refer to an appointing authority: the President of the ICJ in the UK and German Model BITs and the Secretary-General of the UN in the French Model BIT.²⁹⁴

As to ISDS, all three Model BITs provide for an 'unconditional right [for the investor] to bring a suit before an international tribunal'.²⁹⁵ If, after a variable period of time (six months for the German and French Model BITs and three months for the UK Model BIT), the dispute could not be settled through amicable mechanisms, it may be submitted to international arbitration. The French Model BIT only allows for ICSID arbitration, whereas the German and UK models open up a wide range of possible fora for the investor to choose from, including both institutional and *ad hoc* arbitration.

Finally, it should be noted that, as a rule, and contrary to diplomatic protection, ISDS is available to foreign investors independently of the exhaustion of national remedies. In fact, the basic idea behind ISDS is that national courts are not always adequate to deal with foreign investment issues.²⁹⁶ The ICSID Convention reflects precisely this, by confirming that the requirement of exhaustion of national remedies must be expressly stated and should not be assumed.²⁹⁷ Nevertheless, even when the exhaustion of local remedies is not required *per se*, there are some drafting techniques that preserve the roles of national courts – they are what Schreuer calls 'the members of the Calvo clan', which include the requirement of a given period of time before international arbitration may be utilised.²⁹⁸ For example, the BIT concluded between France and China in 1984 (entered into force in 1985) states that, if a dispute persists for six months after an attempt to settle it amicably, the investor may choose to resort to the administrative bodies and the courts of the host State. He may only initiate arbitral proceedings after one year.²⁹⁹

²⁹⁴ Article 9 of the UK Model BIT, Article 10 of the French Model BIT and Article 9 of the German Model BIT.

²⁹⁵ Rudolf Dolzer (2009), p 374.

²⁹⁶ In this sense, see Christoph Schreuer, '*Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*', 4 *The Law and Practice of International Courts and Tribunals* 1 (2005).

²⁹⁷ Cf. Article 26 ICSID Convention.

²⁹⁸ See Christoph Schreuer (2005).

²⁹⁹ Cf. Article 8 of the Décret n° 85-558 du 24 mai 1985 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République populaire de Chine sur l'encouragement et la protection réciproques des investissements (signé à Paris le 30 mai 1984), available at: <http://www.lapres.net/protectinv.pdf>.

This is not, however, the same as saying that foreign investors are denied access to the local courts and administrative bodies of the host State because there is no exhaustion of national remedies requirement. Some BITs actually allow this access expressly and establish that national courts and international arbitration may be used alternatively. That is the case, for instance, of the BIT between Portugal and Peru.³⁰⁰

3. Conclusions

IAs represent the assumption of commitments by the contracting parties regarding the treatment of foreign investors and investments. Accordingly, they contain several elements, including enforcement mechanisms, which are instrumental to those commitments. Investment promotion is one of the main goals proclaimed in IAs, but it does not entail an obligation of liberalisation. It is generally accepted that the stable and predictable framework provided by IAs is in and of itself sufficient to promote investment amongst the contracting parties.

The definition of admission and establishment conditions for foreign investment has traditionally been a sovereign prerogative of States. Nevertheless, it is increasingly common to find IAs that include commitments at this level. After this phase, the establishment of relative and absolute standards of treatment in IAs is extremely relevant to the protection of foreign investors and investments.

Relative standards of treatment correspond to obligations of non-discrimination, which can be required both in relation to national investors and to other foreign investors (NT and MFN treatment). In addition, one of the most important features of IAs is that they aim at protecting foreign investors from takings of property, which may be direct or indirect, by laying out the conditions for those acts to be deemed lawful and by setting standards of compensation. Furthermore, the transfer of funds is covered to a large extent by international instruments that impose or promote the liberalisation of capital movements. Moreover, several types of performance requirements are expressly prohibited by a number of international instruments, such as the TRIMs Agreement and the ECT. Finally, international investment disputes may

³⁰⁰ Article 7 of the Decreto n.º 23/95, que aprova o Acordo de Promoção e Protecção Recíproca de Investimentos entre a República Portuguesa e a República do Peru, D.R. n.º 162, Série I-A de 1995-07-15, available at: <https://dre.pt/application/file/460684>.

be settled through bilateral or third-party mechanisms. ISDS (both institutional and *ad hoc*) is generally considered as one of the greatest advantages of IIL.

Chapter 3 – The interaction between international investment law and cultural rights – an overview

1. Introduction

After briefly analysing the scope and meaning of both cultural rights and IIL, it is now time to understand how they interact. The first idea that should be conveyed in this regard is that IIL and human rights have significant points in common.³⁰¹ As Cotula affirms, '[b]y setting minimum standards of protection and providing international mechanisms for the judicial review of adverse government action, these two bodies of law protect non-state actors against the arbitrary exercise of state sovereignty.'³⁰² In addition, investment tribunals have made use of concepts and standards used in HRL, such as the proportionality doctrine, and have referred to the case-law of human rights courts, as will be seen in more detail in Chapter 6. Finally, HRL represents an alternative route for foreign investors to seek the protection of their interests.³⁰³

Nevertheless, there are also some notable differences between these two areas of law, beginning with the 'different historical trajectories, (...) different philosophical underpinnings, (...) different language and concepts, and (...) different standards of legal protection.'³⁰⁴ Additionally, HRL protects every human being, whereas IIL (in principle) only protects a circumscribed category of people – that of foreign investors covered by relevant IIAs; and HRL requires exhaustion of domestic remedies, whereas IIL usually allows investors to directly access dispute settlement mechanisms against the host State.³⁰⁵ However, these differences have not precluded some cross-pollination between the two areas: first, it appears clear that the developments in HRL which occurred post-World War II have affected the

³⁰¹ In this sense, see Todd Weiler, 'Balancing human rights and investor protection: a new approach for a different legal order', 27 BC Int'l & Comp L Rev 429 (2004), p. 430.

³⁰² Lorenzo Cotula (2012), p. 39.

³⁰³ *Ibidem*.

³⁰⁴ *Ibidem*.

³⁰⁵ Ernst-Ulrich Petersmann, 'Introduction and Summary: 'Administration of Justice' in International Investment Law and Adjudication?' in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009), p. 11; see also Christoph Schreuer and Ursula Kriebaum, 'From Individual to Community Interest in International Investment Law' in Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), p. 1089; and Luke Eric Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration* (Rights and Democracy 2009), p. 17.

development of IIL; and, conversely, IIL demonstrably has the ability to shape the national policies of host States.³⁰⁶

There is evidence that, in cases where there is a conflict of interests between local communities and foreign investors, the latter appear to be much more strongly protected. On the one hand, there is a very significant imbalance in negotiating power, which mirrors the asymmetries found in the legal protection of different rights holders.³⁰⁷ On the other hand, the enforcement mechanisms offered by IIL to foreign investors are much more accessible and effective than the mechanisms offered by international HRL (which rely heavily on the willingness of national courts to take matters seriously, and requires exhaustion of domestic remedies). Hence the need to explore alternative routes within investment law and practice that adequately take into account the interests of different rights holders, including local communities, especially those who are particularly vulnerable, such as ethnic minorities and indigenous peoples.

Human rights and IIL can interact at different levels: first, the host State may harm the foreign investor's rights, which may be protected under both areas of law – this is an interaction that falls outside the scope of this dissertation.³⁰⁸ Second, the investment-promotion and protection conduct of the host State can jeopardise the human rights of its citizens;³⁰⁹ in other words, there may be adverse human rights impacts brought about by a State's compliance with IIL commitments, to the detriment of its autonomy to regulate in the public interest (as will be demonstrated in Section 2 below). Third, the actions of a foreign investor can impair the human rights of local populations in the host State;³¹⁰ this issue is made more critical by the fact that foreign investors are largely only given rights under IIL, rather than obligations, and that HRL, as it stands today, does not directly address corporate responsibility for human rights. However, the international community has been pushing for greater corporate accountability (as will be discussed in Section 3 further below). This brief chapter thus aims at highlighting the specific challenges to the protection of cultural rights in the

³⁰⁶ See Dominic N. Dagbanja, 'The limitation on sovereign regulatory autonomy and internationalization of investment protection by treaty: an African perspective' *Journal of African Law* 56 (2016), p. 60.

³⁰⁷ Lorenzo Cotula (2012), p. 138.

³⁰⁸ It is possible to conceive of situations where, for example, a foreign investor is forced to adjust to a local culture, by having to wear specific types of clothes or follow certain specific rules. This is not, however, the type of clash between IIL and cultural rights which this study aims to address.

³⁰⁹ In this sense, see UNCTAD, *Selected Recent Developments in IIA Arbitration and Human Rights* (UNCTAD/WEB/DIAE/IA/2009/7) (2009), pp. 2-3.

³¹⁰ This matter is intimately connected to the issue of horizontal effect of human rights law, an issue which, although extremely interesting and complex, is beyond the scope of this research.

context of both the restrictions imposed by IIAs on States' regulatory autonomy and obligations imposed on foreign investors.

2. Protecting cultural rights – the State's regulatory autonomy

It has been widely noted that IIAs can bring about a significant restriction of States' regulatory autonomy and their ability to define their own regulatory space, as all domestic regulations affecting protected investments have to be weighed against the applicable IIAs. As one commentator noted, 'not only the actual but also the potential financial and political cost of investor-state arbitration or the threat thereof might suffice to cause a "chilling effect" on national regulation.'³¹¹ This has been identified with the possibility of a 'race-to-the-bottom',³¹² where the will to attract foreign investment dissuades the State from enacting legitimate regulatory measures and eventually leads to a general lowering of standards regarding non-economic objectives, namely human rights.³¹³

Cultural rights are a more circumscribed category than human rights, which poses particular challenges but also offers certain added possibilities. Vadi very expressively refers to 'cultural sovereignty' as 'the freedom of any state to choose its cultural model and to set relevant cultural policies', which is 'an expression of state sovereignty'.³¹⁴ As the author correctly points out, this notion has been endorsed by both the UN General Assembly and the ICJ; the first affirmed that '[e]ach State has the right to freely choose and develop its political, social, economic and cultural systems',³¹⁵ whereas the second stated 'each State is permitted, by the principle of State sovereignty, to decide freely [namely regarding its] political, economic, social and cultural system, and the formulation of foreign policy.'³¹⁶ This 'cultural sovereignty', however, has become more and more restricted by the growth and development of international cultural law and international HRL, which impose

³¹¹ Marc Jacob (2010), p. 13; see also Todd Weiler (2004), p. 433.

³¹² OHCHR, *Human rights, trade and investment report of the High Commissioner for Human Rights* (2003), p. 11.

³¹³ Kate M. Supnik (2009), at 373; Shannon Lindsey Blanton and Robert G. Blanton (2007), p. 144.

³¹⁴ Valentina Vadi (2014), p. 89.

³¹⁵ UN General Assembly, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' (GA Res. 2625, UN GAOR Res., 25th Session, Supp. No. 28, UN Doc. A/8028, 1970)

³¹⁶ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, [1986] ICJ Reports 14, paragraph 205.

specific obligations on States.³¹⁷ These bodies of law interact deeply and the boundaries between them are not as defined and straightforward as one could hope. In a 'context of global legal pluralism', a network of legal sources coexist and intermingle, from national law (of several different countries) to international law and transnational contracts, and create competing claims, each offering different levels of protection.³¹⁸

When States exercise their cultural sovereignty – which should always be done with respect for all human rights – there is a risk that cultural regulatory action clashes with IIL commitments. As Vadi points out, '[t]he cultural goal of a regulatory measure does not imply per se absence of discrimination or of any other breach of investment treaties'.³¹⁹ To put it differently, it is worth asking, as Higgins did,³²⁰ who should bear the economic cost of regulations enacted in the public interest, but which negatively affect foreign investors. The question is hard to answer, and it largely depends on the specificities of each case; whereas States' powers to regulate are unquestioned, and could entail takings of foreign investors' property, the matter of compensation complicates the situation further.³²¹

If a State (that is, society as a whole) always had to bear the cost of regulating in the public interest, it might be dissuaded from doing so; if the cost systematically fell on the foreign investor's shoulders (that is, if the State never compensated investors for the effects of regulation in the public interest), there could be much room for abuse of regulatory power.³²² On the other hand, investment flows would likely decrease, as the State in question would be viewed as a high-risk country. As Vicuna points out, in the past, the answer to this question would entail a choice between pro-property and pro-State positions; presently, the answers are more nuanced, and involve 'a determination of the extent of the rights eventually affected, the incidence of the measure taken, and the genuine need for a public purpose and non-discrimination.'³²³

³¹⁷ For a very interesting review of cultural sovereignty, cultural relativism and human rights, see Anne F Bayefsky, 'Cultural sovereignty, relativism, and international human rights: New excuses for old strategies', 9 Ratio Juris 42 (1996).

³¹⁸ Lorenzo Cotula (2012), p. 136.

³¹⁹ Valentina Vadi (2014), p. 90.

³²⁰ In a pioneering study on taking of property: Rosalyn Higgins, *The taking of property by the state: recent developments in international law* (Martinus Nijhoff 1982).

³²¹ In this sense, see Francisco Orrego Vicuna, 'Carlos Calvo, honorary NAFTA citizen', 11 NYU Envtl LJ 19 (2002), pp. 23-24.

³²² Valentina Vadi (2014), p. 90.

³²³ Francisco Orrego Vicuna (2002), p. 24.

One could ask why States should choose to subject themselves to IIL, if it risks constraining their regulatory space so much and putting vulnerable local communities at risk. The main justification for investment protection lies in the fact that ‘foreign investors tend to be more vulnerable than nationals to arbitrary treatment by the host state, because they lack political representation in that state and because they may fall victim of political manipulation by governments in search of scapegoats to defuse internal tensions’.³²⁴ Furthermore, foreign investors often tend to be more vulnerable to ‘discriminatory government action’.³²⁵ The vulnerability argument was endorsed by the European Court of Human Rights (ECtHR), in *James and Others v. United Kingdom*,³²⁶ but it is important to reflect on a very significant question: is it really possible to say that an international oil company is more vulnerable to arbitrary State interference than a local farmer – or, I might add, an indigenous community?

States have an international human rights obligation to protect cultural rights from third-party interference, as results from General Comment no. 21.³²⁷ Human Rights Courts have consistently upheld this obligation; for instance, in *Sawhoyamaya Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights (IACtHR) had to decide on a case involving the restitution of ancestral lands to an indigenous community. The owner of these lands was protected under a BIT between Paraguay and Germany, which led the government to resist restitution.³²⁸ However, the Court considered that

[the BIT] allows for capital investments made by a contracting party to be condemned or nationalized for a “public purpose or interest”, which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a

³²⁴ Lorenzo Cotula (2012), p. 143.

³²⁵ *Ibidem*.

³²⁶ *James and Others v. United Kingdom*, Judgment, 21 February 1986, European Court of Human Rights, 8 EHRR 123.

³²⁷ General Comment No. 21, paragraphs 48 and 50. See also: UN, Protect, Respect and Remedy: a Framework for Business and Human Rights (A/HRC/8/5) (7 April 2008).

³²⁸ *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, 29 March 2006, Inter-American Court of Human Rights, paragraph 115(b).

*class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.*³²⁹

Another relevant case from the IACtHR, *Saramaka People v. Suriname*, also refers to the restitution of ancestral lands to an indigenous community, which had been removed for the construction of a dam. The Court affirmed that this tribe was protected by international HRL, 'that secures the right to the communal territory they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival', and that the State had to 'recognize, respect, protect and guarantee' this right.³³⁰ It added that the right to property is not absolute, which means that the State has the ability to restrict it, under certain circumstances, to allow for the issuance of logging and mining concessions for the exploration and extraction of certain natural resources found within Saramaka territory.³³¹ However, such restrictions can only take place if the State complies with a number of requirements, which include effective participation of the indigenous people; reasonable benefit to be received by the community; and a prior environmental and social impact assessment.³³²

As Cotula rightly observes, when States decide to take action in order to protect local communities, they have to weigh the cost of compensating foreign investors for their losses. This is susceptible of entailing disincentives for States to effectively undertake such protection, or jeopardising compliance with international human rights standards.³³³ It is crucial to motivate host States to implement effective and comprehensive policies that promote and protect the cultural rights of their citizens. For this to happen, States need to *trust* that international investment tribunals will pay deference to their sovereign right to regulate internally (which remains uncertain), especially when there are international cultural rights obligations that are binding on these States.

This is already happening to a certain extent – the most obvious example being the case of *Glamis Gold v. USA*,³³⁴ which will be analysed in more detail in Chapter 6. In this case, California introduced a mandatory backfilling requirement for a mining

³²⁹ *Idem*, paragraph 140 (emphasis added).

³³⁰ *Case of the Saramaka People v. Suriname*, Judgment, 28 November 2007, Inter-American Court of Human Rights, paragraph 96.

³³¹ *Idem*, paragraph 127.

³³² *Idem*, paragraph 129.

³³³ See Lorenzo Cotula (2012), p. 118-119.

³³⁴ *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009).

project on sacred Native American sites. The investor's claims were dismissed in their entirety, demonstrating that arbitral tribunals are capable of taking non-economic goals into account – in fact, the tribunal considered that 'governments must compromise between the interests of competing parties'.³³⁵ However, this does not mean that IIL and cultural rights are fully integrated, or even that this integration was achieved in an ideal way in *Glamis Gold*. Even though the outcome of the award had the practical effect of protecting cultural rights, and the participation of the Quechan Indian Nation as *amicus curiae* was allowed, which in itself is of great significance, the tribunal ended up not addressing any of the human rights and cultural arguments raised by the *amici* (it did not even mention HRL at all), which begs the question of whether these arguments were simply ignored or avoided. Perhaps more tellingly, an in-depth analysis of arbitral practice demonstrates that there is no coherent response to arguments connected to human rights or cultural heritage, and that there is still a high level of uncertainty regarding how much these arguments may impact the final decision. This uncertainty is crucial when it comes to States' incentives to regulate in the public interest, and this is a ponderous reason why a more effective integration of international investment and cultural rights is necessary.

Moreover, in spite of the obvious potential overlap between IIL and human rights, 'investor-state arbitral tribunals remain reluctant to examine human rights arguments raised in *amicus curiae* submissions or on their own initiative (for example, as part of "contextual interpretation" *proprio motu* following the principle of *jura novit curia*) if human rights have not been argued by the parties'.³³⁶ In fact, strictly speaking, arbitrators do not have the power to adjudicate human rights violations *per se*. Nevertheless, they may be called upon to assess HRL in the context of an investment dispute, since 'the law applicable to investment arbitrations typically encompasses international law (rather than simply the given investment protection treaty), and (...) this could include other non-economic forms of international law'.³³⁷ Amongst the bodies of international law that arbitrators should take into account when assessing an investment dispute, human rights – and, in particular, cultural rights – are key to the present research. According to Article 31(3)(c) of the Vienna Convention, treaties (including IIAs) should be interpreted in the light of 'any relevant rules of international

³³⁵ *Idem*, paragraph 804.

³³⁶ Ernst-Ulrich Petersmann (2009), pp. 11-12. In this sense, see also UNCTAD, *Selected Recent Developments in IIA Arbitration and Human Rights* (2009), p. 3. This matter will be explored in Chapter 6.

³³⁷ Luke Eric Peterson (2009), p. 22.

law applicable in the relations between the parties'. This thus includes, *inter alia*, international human rights obligations and international cultural law.

Contrary to what happens in other areas of economic law, 'investment treaty dispute settlement is dispersed, ad-hoc and often opaque.'³³⁸ As a consequence of this dispersion and confidentiality, even if there are instances where investment arbitration might have human rights implications, the public may not be made aware of their existence. Therefore, the analysis of arbitral awards conducted in the course of this study should not be seen as exhaustive, as not all disputes are in the public domain. The potential restrictive impact of IIL on States' regulatory autonomy, as seen through the lens of investment tribunals and the relevant case-law, will be analysed in detail in Chapter 6.

3. Protecting cultural rights – investor's obligations

The most delicate part of the interaction between IIL and cultural rights is perhaps the one that relates to violations perpetrated by the foreign investor, or by the State with the knowledge and contribution of the foreign investor. The size, cross-border character, nature and power of MNEs changed with the process of globalisation, making it ever more necessary to address their role in the protection of human rights. As Muchlinski rightly observed, '[t]he traditional notion that only states and state agents can be held accountable for violations of human rights is being challenged as the economic and social power of MNEs appears to rise in the wake of the increasing integration of the global economy that they have helped to bring about.'³³⁹

As Weiler points out,

*While it may not be clear that transnational corporations (both large and small) wield the power alleged by some of their harshest critics, there is a considerable amount of evidence to suggest that foreign enterprises operating investments in the developing world have committed, or been complicit in, environmental, labor, and human rights abuses.'*³⁴⁰

³³⁸ Luke Eric Peterson and Kevin R Gray, 'International human rights in bilateral investment treaties and in investment treaty arbitration' International Institute for Sustainable Development (IISD) (2003), p. 15.

³³⁹ Peter T Muchlinski, 'Human rights and multinationals: is there a problem?', 77 International Affairs (Royal Institute of International Affairs) 31 (2001)

³⁴⁰ Todd Weiler (2004), p. 433.

It should be recalled, at this point, that IIL is largely unbalanced, in the sense that agreements generally establish rights for the foreign investor without imposing on them any obligations, which means that States are virtually not able to sue foreign investors in an investment treaty tribunal.³⁴¹ As one commentator put it, ‘arbitration is a mechanism for investors, not for states’.³⁴² IIAs could, in theory, contain provisions imposing specific human rights obligations on the investor, but, in reality, very few do.³⁴³ Consequently, IIL does not provide a direct solution to these concerns.

This means that it is crucial to understand what mechanisms can be used to ensure that foreign investors do not compromise local communities’ cultural rights. Such mechanisms comprise, without a doubt, (1) the establishment of voluntary corporate conduct codes (to be assessed in detail in Chapter 4); (2) performance standards in the context of investment loans (which will be analysed in Chapter 5), and (3) the effective use of international investment arbitration for the protection of cultural rights, which could occur through an adequate, culturally-sensitive interpretation of IIA provisions or through the introduction of specific human rights mechanisms within investment arbitration.

As to the first two mechanisms, Chapters 4 and 5 will demonstrate that there are already several alternatives within the realm of soft law that have the potential to minimise an investment’s human rights impacts (in particular, cultural rights). Even though these instruments do not provide a complete solution, their contribution to the integration of international investment and cultural rights is not to be underestimated.

In the majority of cases where investment tribunals referred to human rights in their decisions, international human rights instruments and practice have been taken into account most frequently to help clarify the protection of foreign investors under IIAs.³⁴⁴ Nevertheless, several decisions have also referred to investor obligations, sometimes to the point where treaty protections are denied as a result of the investor’s unlawful conduct – these matters will be addressed in detail in Chapter 6.

³⁴¹ The possibility of counterclaims will be assessed in Chapter 6.

³⁴² Dominic N. Dagbanja (2016), p. 74.

³⁴³ Marc Jacob (2010), p. 9.

³⁴⁴ Luke Eric Peterson (2009), p. 23

4. Conclusions

This brief chapter aimed at introducing the relationship between IIL and cultural rights, which have several points in common, but also significant differences.

Cultural sovereignty refers to the right of every State to freely choose its cultural model and to set relevant cultural policies. This sovereignty has become more and more constricted by the growth and development of international cultural law and international HRL, which impose specific obligations on States. When States exercise their cultural sovereignty, there is a risk that cultural regulatory action clashes with IIL commitments.

Whenever there is a conflict of interests between local communities and foreign investors, the latter appear to be much more strongly protected. Even though States are under an international obligation to protect cultural rights, they may be dissuaded from doing so because of the economic impact of compensating affected foreign investors. In order for the cultural rights of local communities to be protected, States need to trust that international investment tribunals will pay deference to their sovereign right to regulate internally, especially when there are international cultural rights obligations that are binding on these States. It is important to note, in this regard, that arbitrators do not have the power to adjudicate human rights violations *per se*; however they may be called upon to integrate HRL in the context of an investment dispute.

Finally, it became clear that foreign investors may be directly responsible for, or complicit with, human rights violations. With the globalisation process, MNEs have become much more powerful and capable of affecting the enjoyment of human rights directly. Neither IIL nor HRL, at this point, offer direct answers to this problem; therefore, it is necessary to assess the mechanisms that are available to ensure the protection and enforcement of cultural rights in the context of foreign investment, which necessarily includes voluntary conduct codes (analysed in Chapters 4 and 5) and the integration of HRL and international investment by investment tribunals (covered in Chapter 6).

PART II
Respecting Culture

Chapter 4 – Operationalising Corporate Social Responsibility

After establishing the conceptual framework for this research, it is now time to start analysing some of the soft and hard law mechanisms that can be resorted to, in order to ensure respect for cultural rights within the context of foreign investment. Starting with the soft law solutions, this chapter will focus on voluntary conduct codes – also known as Corporate Social Responsibility³⁴⁵ (hereinafter, CSR).

The main goal of this chapter will be to understand how CSR may be operationalised so as to provide sufficient protection for the cultural rights of affected stakeholders, before an investment dispute has a chance to occur. It will also identify and assess some of the most relevant initiatives,³⁴⁶ and ascertain if it is realistically possible to influence the behaviour of MNEs in a positive way, thus minimising adverse impacts on the cultural rights of affected stakeholders.

The first part of the chapter will analyse the concept, origins and scope of CSR (Section 1), followed by an attempt to briefly characterise the most noteworthy initiative taken at the UN level – the UN Global Compact (hereinafter, UNGC), which is the largest and most significant CSR initiative in the world – with particular focus on the cultural rights of indigenous peoples (Section 2). Finally, some conclusions will be drawn with respect to the appropriateness and effectiveness of CSR to protect cultural rights (Section 3).

1. The concept, origins and scope of CSR

Although a consensual and conclusive definition of CSR appears to be lacking, it has been described as ‘that strange mixture of altruism and corporate communications (...) [s]itting at the juncture of business and law, marketing and ethics, human rights

³⁴⁵ Authors such as Logsdon and Wood suggest a different terminology, i.e., the use of the expression ‘Global Business Citizenship’ or GBC – See Jeanne M Logsdon and Donna J Wood, ‘*Global business citizenship and voluntary codes of ethical conduct*’, 59 *Journal of Business Ethics* 55 (2005). In this thesis, I have opted for the more common term (CSR) to avoid confusion.

³⁴⁶ Other relevant initiatives exist, some of which will be explored in the next chapter. However, for reasons of space, only the most significant will be assessed in this dissertation.

and international relations. (...) [It] is not only ameliorative³⁴⁷ and pragmatic but also directly linked with big goals like sustainability, social justice and world peace.³⁴⁸ CSR is not a new concept – it had already been referred to and characterised in the 1970s as ‘encompass[ing] the economic, legal, ethical and discretionary expectations that society has of organizations at a given point in time.’³⁴⁹ CSR initiatives aim at self-regulation and generally present three specific traits: (1) participation in these programmes is voluntary; (2) each programme focuses on one or more dimensions of CSR; and (3) these initiatives generate dialogue amongst stakeholders in order to advance the focus area.³⁵⁰ CSR is so relevant, complex and eminent in today’s society that it has become ‘one of the flavours and hopes of the new Millennium’³⁵¹ and ‘an industry in itself’, as noted by The Economist in 2004. The publication states:

*CSR, at any rate, is thriving. It is now an industry in itself, with full-time staff, websites, newsletters, professional associations and massed armies of consultants. This is to say nothing of those employed by the [Non-Governmental Organisations (NGOs)] that started it all. Students approaching graduation attend seminars on “Careers in Corporate Social Responsibility”. The annual reports of almost every major company nowadays dwell on social goals advanced and good works undertaken. The FTSE and Dow Jones have both launched indices of socially responsible companies. Greed is out. Corporate virtue, or the appearance of it, is in.*³⁵²

³⁴⁷ For a detailed analysis of the contrast between the earlier, ‘transformative’ form of CSR, and contemporary, ‘ameliorative’ CSR, see Paddy Ireland and Renginee G. Pillay, ‘Corporate Social Responsibility in a Neoliberal Age’ in Peter Utting and José Carlos Marques (eds), *Corporate Social Responsibility and Regulatory Governance - Towards Inclusive Development?* (Palgrave Macmillan 2013): ‘While the earlier idea of the socially responsible corporation had a genuinely transformative edge, (...) contemporary CSR is essentially ameliorative, seeking to temper without unsettling or displacing the idea of the corporation as a private, exclusively shareholder- and profit-oriented enterprise’, at pp. 77-78.

³⁴⁸ Jonathan A. Bush, ‘An Emerging History of CSR - The Economic Trials at Nuremberg (1945-49)’ in Charlotte Walker-Said and John D. Kelly (eds), *Human Rights in the New Global Economy - Corporate Social Responsibility?* (The University of Chicago Press 2015), p. 125.

³⁴⁹ Archie B Carroll, ‘A three-dimensional conceptual model of corporate performance’, 4 *Academy of management review* 497 (1979), p. 500.

³⁵⁰ Ursula Wynhoven and Yousuf Aftab, ‘The Virtue of Voluntarism - Human Rights, Corporate Responsibility, and UN Global Compact’ in Charlotte Walker-Said and John D. Kelly (eds), *Human Rights in the New Global Economy - Corporate Social Responsibility?* (The University of Chicago Press 2015), p. 234.

³⁵¹ The expression is borrowed from Paddy Ireland and Renginee G. Pillay (2013), p. 77.

³⁵² See The Economist, ‘Corporate social responsibility - Two-faced capitalism’ (2004), available at: <http://www.economist.com/node/2369912>.

The origins of contemporary CSR date back at least to the 1960s and 1970s,³⁵³ when public opinion started to focus on the activities of MNEs operating in developing countries, that often severely disregarded or even directly compromised human rights and environmental protection. Its most significant expansion occurred in the aftermath of the Cold War, at the same time as globalisation accelerated.³⁵⁴ At its roots, there were both external pressures (from NGOs and other critics) and internal corporate recognition that industry standards needed to be raised, although the latter appears to have been less of a motivation than the former.³⁵⁵ The expansion of CSR was concomitant with the expansion of FDI,³⁵⁶ as more and more companies had the possibility of operating in different (often less developed) countries. As neo-liberal policies led to the deregulation of labour, environment and rights of people affected by the investment, 'much of the responsibility for monitoring international capital has shifted from the state to NGOs and social movements.'³⁵⁷

In order to address the 'governance gaps created by globalization',³⁵⁸ a number of soft law standards have been developed. The most relevant of these soft law standards include the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,³⁵⁹ as well as the OECD Guidelines for Multinational Enterprises.³⁶⁰ The latter, with 46 adhering members, has evolved into 'a hybrid model that increasingly blurs the boundary between self-regulation and

³⁵³ Although some authors identify earlier roots, namely in the Nuremberg economic trials and the body of case-law around the Alien Tort Statute in the US. In this sense, see Jonathan A. Bush (2015) and Paddy Ireland and Renginee G. Pillay (2013). For an insightful analysis of the US enforcement of the Alien Tort Statute, see David Scheffer, 'The Impact of the War Crimes Tribunals on Corporate Liability for Atrocity Crimes under US Law' in Charlotte Walker-Said and John D. Kelly (eds), *Human Rights in the New Global Economy - Corporate Social Responsibility?* (The University of Chicago Press 2015). A good yet concise historical account of the origins of CSR is also present in Archie B Carroll (1979) and Rhys Jenkins, 'Globalization, corporate social responsibility and poverty', 81 *International affairs* 525 (2005).

³⁵⁴ Peter Rosenblum, 'Two Cheers for CSR' in Charlotte Walker-Said and John D. Kelly (eds), *Human Rights in the New Global Economy - Corporate Social Responsibility?* (The University of Chicago Press 2015), p. 33.

³⁵⁵ Stuart Kirsch, 'Virtuous Language in Industry and the Academy' in Charlotte Walker-Said and John D. Kelly (eds), *Human Rights in the New Global Economy - Corporate Social Responsibility?* (The University of Chicago Press 2015), p. 95.

³⁵⁶ A significant expansion of CSR codes occurred since the 2007-2008 global financial crisis, a period which also corresponded to a tendency for literature on the subject to become much more prolific. In this sense, see Francesca Cuomo et al., 'Corporate Governance Codes: A Review and Research Agenda' *Corporate Governance: An International Review* (2015), p. 1.

³⁵⁷ Stuart Kirsch (2015), p. 96.

³⁵⁸ UN, Protect, Respect and Remedy: a Framework for Business and Human Rights (A/HRC/8/5) (7 April 2008), paragraph 3.

³⁵⁹ *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (Governing Body of the ILO, 204th Sess. (1977), last amended 295th Sess. (2006)), available at: http://www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm.

³⁶⁰ *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011), available at: <http://dx.doi.org/10.1787/9789264115415-en>.

accountability’,³⁶¹ with the creation of ‘the implementation mechanism of National Contact Points (NCPs), agencies established by adhering governments to promote and implement the Guidelines’.³⁶²

The main interlocutors of CSR discourse are (1) shareholders and investors, (2) consumers, (3) NGOs, and (4) workers. The first have been targeted by this discourse mostly as a reaction to what is referred to as ‘shareholder capitalism’, which led MNEs to feel the need to reassure both their shareholders and their potential investors that they were adopting voluntary corporate conduct codes in order to minimise risk. As Kaeb states, ‘[t]he legal dimension of CSR is determined largely by the fiduciary duties owed by corporate directors and officers to the corporation.’³⁶³ This is intimately related to the concept of ‘shareholder primacy’,³⁶⁴ prevalent in the US, ‘according to which management decisions need to be in the best interest of shareholders (in terms of profit maximization) in order to avoid a breach of fiduciary duties’.³⁶⁵ In Europe and Asia, fiduciary duties are usually understood widely, so as to encompass stakeholder interests, but in global terms, this approach lost popularity when faced with the Anglo-American model. As Noyoo affirms, ‘(...) in Japan, firms have long been associated with the community and also regarded as a fundamental part of the society to which individual employees belonged. In contrast to an Anglo-American model of community, in Japan both individuals and companies are members of society and *hence responsible to it*.’³⁶⁶ However, by the end of the 20th century, ‘it was being claimed that the debate about corporate governance was over: the exclusively shareholder-oriented, Anglo-American model of the corporation had triumphed over its more stakeholder-friendly German, French and Japanese rivals.’³⁶⁷ In either case, any management decision that leads to profit reduction (such as would result from implementing CSR strategies that can lower the return of an investment) will see its legitimacy being assessed by corporate law, which can lead to an insufficient consideration of human rights objectives.³⁶⁸ In fact, corporate law mainly focuses on

³⁶¹ Caroline Kaeb (2015), p. 115.

³⁶² See *OECD Guidelines for Multinational Enterprises*, p. 3.

³⁶³ Caroline Kaeb (2015), p. 113.

³⁶⁴ Which can be seen as a paradox, since the maximisation of ‘shareholder value’ was precisely what earlier, ‘transformative’ forms of CSR wanted to fight. See Paddy Ireland and Renginee G. Pillay (2013), p. 87 et seq.

³⁶⁵ Caroline Kaeb (2015), p. 113.

³⁶⁶ Ndongwa Noyoo, ‘Linking Corporate Responsibility and Social Policy in Zambia’ in Peter Utting and José Carlos Marques (eds), *Corporate Social Responsibility and Regulatory Governance - Towards Inclusive Development?* (Palgrave Macmillan 2013), p. 106 (emphasis added).

³⁶⁷ Paddy Ireland and Renginee G. Pillay (2013), p. 86.

³⁶⁸ Caroline Kaeb (2015), p. 113.

the protection of shareholder interests: ‘corporate managers are under a fiduciary duty to further shareholder – and not public – interests.’³⁶⁹ However, their activities aimed at profit maximisation cannot violate the law, which makes it clear that when legal norms exist and they impose certain public interest obligations on companies, these have to be respected. In the UK, for example, the Companies Act was amended in 2006 and Article 172(1) was expanded so as to include stakeholder interests.³⁷⁰

Consumers became an important audience for CSR discourse as well, as their concern for sustainability grows and certification programmes become more and more important. However, certain industries – such as the mining industry – are ‘largely immune to consumer politics’, since most metals are virtually ‘anonymous’, i.e., their sources are mostly impossible to identify, as is evident with the case of copper wires used in computer manufacturing.³⁷¹

The role of NGOs as interlocutors of CSR discourse is controversial, as increasingly high numbers of these organisations choose to cooperate with compliant MNEs, leaving some groups such as indigenous peoples in a position where they find it hard to trust NGOs and do not see them as allies, but rather as the enemy.

Workers are the last interlocutors of CSR discourse, as MNEs tend to appear concerned with sustainability to attract labour and avoid confrontation with employees. It is evident that several communities close to investment projects, such as mining, are generally very environmentally conscious. These four categories of CSR discourse audience exemplify the variety of objectives pursued by MNEs and justify the characterisation of CSR as what anthropologists call ‘strategically deployable shifters’, i.e., the use of shared language for a multiplicity of different situations, contributing to communication ‘across social boundaries and political vantage points.’³⁷²

There are essentially three types of corporate codes of conduct as to their source of origin and addressees: internal, external and third-party. The first refers to cases where the company adopts a code of conduct which does not extend to external stakeholders, thus focusing on employees and management. External codes of conduct are elaborated and adopted by companies, but reach outside groups and

³⁶⁹ Caroline Kaeb, ‘Law, Morality, and Rational Choice - Incentives for CSR Compliance’ (2015), p. 196.

³⁷⁰ UK Companies Act 2006, Article 172(1), available at: http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf.

³⁷¹ Stuart Kirsch (2015), p. 101.

³⁷² *Idem*, pp. 102-103.

often address a wide range of stakeholders. Third-party codes of conduct are elaborated by an external group and adopted by companies, as they become members or signatories to that initiative.³⁷³

Bondy et al. further identify three different 'tones' that corporate conduct codes may adopt: punitive, principles and commitment codes. Punitive codes are likely to include sanctions (or threat thereof) for noncompliance, thus assuming a 'quasi-legal role within the company for control of employee or management behavior'; principles codes contain statements indicating the intention to participate in CSR, normally with defined stakeholders, nevertheless 'the statements are broad with little or no indication of how or why they intend to engage in this way'; finally, commitment codes 'indicate the corporation's intention to engage in CSR but statements are more specific, commitments are more formalized, and sometimes intended actions or behaviors are associated with the statements.'³⁷⁴

The last categorisation to keep in mind is probably the most obvious one, relating to the level of hierarchy reflected in each corporate conduct code: there are international codes (those issued by transnational institutions, such as the OECD), national codes (individually or jointly issued by institutions within a country, such as the stock exchange), and individual codes (issued by individual companies, with the objectives of 'establish[ing], and (...) communicat[ing] to investors and other stakeholders, the governance principles adopted by the firm').³⁷⁵ Disclosure of compliance with national codes can be mandatory or voluntary (even though adoption is always voluntary) and can be required by a listing authority (as is the case in the UK) or by law (as happens in several other EU countries). It is interesting to note that, in 2014, the EU adopted a Directive which requires disclosure of non-financial information by companies with over 500 employees. This includes 'policies, risks and outcomes as regards environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and bribery issues, and diversity on boards of directors.'³⁷⁶ According to Cuomo et al., '[w]hen the disclosure of governance practices is mandatory, the effectiveness of governance codes increases, because the external

³⁷³ Krista Bondy et al., 'The adoption of voluntary codes of conduct in MNCs: a three-country comparative study', 109 *Business and Society Review* 449 (2004), p. 453.

³⁷⁴ *Idem*, p. 454.

³⁷⁵ See Francesca Cuomo et al. (2015), p. 2.

³⁷⁶ European Commission, *Disclosure of non-financial information: Europe's largest companies to be more transparent on social and environmental issues* (29 September 2014), available at: http://europa.eu/rapid/press-release_STATEMENT-14-291_en.htm.

(i.e., market) disciplinary mechanism can work well only with informative disclosure on adoption and/or explanation.³⁷⁷ By contrast, in less developed countries, there is a tendency to make disclosure of compliance voluntary, which weakens the effectiveness of the codes.³⁷⁸

1.1. Drivers, compliance and the effectiveness of CSR

Corporate compliance with voluntary conduct codes raises several difficulties, namely at the level of incentives to comply. These incentives obviously include legal norms, but go far beyond it; in fact, one can expect morality to affect MNEs, 'whether in the form of conventions, rational choice, psychological preferences, or an overarching "sense of justice"'.³⁷⁹

Four reasons have been put forth as the main drivers for business adoption of CSR standards: moral obligation, sustainability, license to operate and reputation.³⁸⁰ The first driver, *moral obligation*, refers to either the fiduciary duties of a company to its shareholders or, more importantly, the 'obligations a firm has as a result of its existence, its reasons for existence, scope and nature of operations, and its various interactions'.³⁸¹ In other words, the moral obligation of MNEs to voluntarily adopt corporate conduct codes is a reflection of what they *should* do in order to take into account the impact business has on the main stakeholders (including shareholders, employees, suppliers, customers and, secondarily, the communities in which MNEs operate).

Sustainability, on the other hand, refers to the need to take into account future generations and their ability to enjoy natural and human resources. In the words of Porter and Kramer, '[s]ustainability emphasises environmental and community stewardship'.³⁸² This means that companies should strive to prioritise long-term performance over short-term benefits that might be detrimental to future generations. The idea of *license to operate* suggests that MNEs require some kind of consent

³⁷⁷ Francesca Cuomo et al. (2015), p. 2.

³⁷⁸ *Idem*, p. 3.

³⁷⁹ Caroline Kaeb, 'Law, Morality, and Rational Choice - Incentives for CSR Compliance' (2015), p. 202.

³⁸⁰ Michael E Porter and Mark R Kramer, 'Strategy & Society: The Link between Competitive Advantage and Corporate Social Responsibility' Harvard Business Review (2006), pp. 2-3.

³⁸¹ Patricia H Werhane, 'Corporate Social Responsibility/Corporate Moral Responsibility: Is There a Difference and the Difference It Makes' in Steven K. May et al. (eds), *The Debate over Corporate Social Responsibility* (Oxford University Press 2007), p. 460.

³⁸² Michael E Porter and Mark R Kramer (2006), p. 3.

(explicit or tacit) from all of the affected stakeholders in order to conduct a business enterprise, including governments and communities. Finally, *reputation* is a very relevant driver for the adoption of CSR standards, since it has the potential to improve the public perception of a company, strengthen its brand and possibly raise the value of its stock.³⁸³

It is possible to affirm, with Kaeb, that reputational risks are one of the most significant factors affecting corporate compliance, that is, 'reputational costs and benefits have increasingly become part of corporations' calculus in the form of their risk management as well as their branding and marketing efforts.'³⁸⁴ This author also emphasises the fact that fines, for example, could be less effective as an incentive to comply, since there is virtually no more uncertainty as to the consequences of non-compliance (i.e., the firm knows exactly what the worst consequence is). Raising uncertainty levels arguably provides a stronger incentive to comply, and, in that scenario, the uncertainty about reputational costs leads to higher rates of compliance.

In this context, Kaeb affirms that '[b]y imposing a monetary fine, the relationship between parties shifts from a nonmarket to a market orientation since the fine puts a price on wrongdoing, and thus commoditizes it. A social relationship thus becomes a market exchange.'³⁸⁵ This point is particularly important, since, as the author notes, if human rights are commoditised, firms will tend to treat them as simple costs and collateral damage, which can be offset by profits in other areas; if, conversely, respect for human rights is driven by a combination of internal and external incentives linked to morality and the willingness to 'do good' and 'do better', it is arguably more likely that compliance will ensue.³⁸⁶

According to Porter and Kramer, the problem with the four drivers mentioned above (moral obligation, sustainability, license to operate and reputation) is that none of them sufficiently provides the means for a company to identify issues, establish priorities, and tackle social problems that either are the most relevant or are the ones that a specific business can impact the most. Wynhoven and Aftab, on the other hand, defend that CSR has 'the unique potential to become corporate drivers', motivating

³⁸³ In this sense, Michael E Porter and Mark R Kramer (2006), p. 3.

³⁸⁴ Caroline Kaeb, 'Law, Morality, and Rational Choice - Incentives for CSR Compliance' (2015), p. 204.

³⁸⁵ *Ibidem*.

³⁸⁶ For an insightful analysis of the undermining effect of sanctions, see Leandro Martins Zanitelli, 'Corporations and Human Rights: The Debate between Voluntarists and Obligationists and the Undermining Effect of Sanctions', 15 SUR-Int'l J on Hum Rts 35 (2011).

companies to perform better than the law requires and above minimum standards. This can be achieved in four ways: (1) competition amongst MNEs can lead to better corporate citizenship; (2) voluntary corporate codes can fill in the gaps left by insufficient State regulatory activity; (3) high CSR standards have the potential to attract better and more qualified employees; (4) CSR allows companies to pay due regard to the demands of consumers and the public in general.³⁸⁷

In sum, when asking why companies adopt corporate codes of conduct, there are mainly two perspectives reflected in legal literature: a normative one, which affirms that 'codes are a formalization of corporate values or practices', designed as 'a way of formalizing, encouraging, and guiding employee behavior';³⁸⁸ and an instrumental view, which emphasises elements such as reputational benefit, avoiding government interference, product differentiation, reduced insurance premiums, government failure to regulate, enhancement of relationships with customers, among others.³⁸⁹

Regarding the effectiveness of CSR, several observations need to be made. First of all, it is crucial to note that a high number of critics have come forth in the past three decades, questioning whether voluntary codes of corporate conduct work at all – and whether they should even exist. As MNEs started to operate internationally, particularly within developing countries, it appeared clear for some that there was a business opportunity that should not be missed: companies had the chance to take advantage of more beneficial business environments present in such countries, with cheaper labour and weaker legal standards, thus improving the potential for profit. Even where strict regulation actually existed, a serious lack of enforcement opened a window of opportunity that MNEs were able to exploit. In fact, the governments of developing countries had an incentive to allow for this kind of opportunistic behaviour – if there were clear and enforceable rules, MNEs could move to other countries with more favourable conditions, hence lowering the levels of foreign investment coming into the country. In addition, several developing countries lack a democratic and representative government, thus increasing the danger of decision-makers not taking into account the interests of their citizens.³⁹⁰ Some commentators thus defended that introducing social concerns in the operations of MNEs was simply wrong in and of

³⁸⁷ Ursula Wynhoven and Yousuf Aftab (2015), p. 239.

³⁸⁸ Krista Bondy et al. (2004), p. 449.

³⁸⁹ *Idem*, pp. 450-451.

³⁹⁰ In this sense, see Sean D Murphy, '*Taking multinational corporate codes of conduct to the next level*', 43 Colum J Transnat'l L 389 (2004), pp. 398-399.

itself. In fact, in 1962, Friedman stated that embedding social responsibility in corporate conduct was ‘fundamentally subversive’ and further affirmed that ‘[f]ew trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible.’³⁹¹

Even for those who disagreed with Friedman, there were still several downsides that could not be ignored. The most prominent one relates to the voluntary nature of CSR codes, which raised concerns as to the possibility of MNEs using them as public relations manoeuvres, rather than genuine commitment to socially responsible conduct. This led to several appeals to the adoption of binding, hard law mechanisms to ensure CSR, or to the legalisation of CSR codes. Such a change, however, appears to be unlikely from a political point of view (at least at this point in time) and might even be economically undesirable.³⁹² Other criticism refers to the scarcity of courts considering CSR codes, the ease with which MNEs manage to circumvent these codes, or even the fact that the introduction of morality in corporate conduct might suppress innovation.³⁹³ As Murphy states, ‘[o]ver time, if the codes remain in nature as they presently are, while demands for social and environmental justice increase, the codes may lose much of their legitimacy’ and, furthermore, ‘as they wither away, the codes will be viewed as simply stepping stones in the crystallization of law.’³⁹⁴

So, what are the solutions for this problem? It is hard for national legislation to present viable solutions, particularly when taking into account that the countries that need it the most (developing countries) might be reluctant to enact regulations that could diminish their competitive advantage in a free market. In fact, the reason why codes were suggested in the first place has everything to do with States’ difficulties regarding the regulation of cross-border non-State entities, coupled with the intention to allow for some flexibility and to foster the internalisation of socially responsible behaviour on the side of MNEs. Murphy thus suggests a ‘middle way’:

Rather than view "command-and-control" laws as the next best step in addressing [MNE] conduct, policy-makers should consider a range of

³⁹¹ As cited in Archie B Carroll (1979), p. 497.

³⁹² Sean D Murphy (2004), p. 396.

³⁹³ See Mark B Baker, ‘Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?’ The University of Miami Inter-American Law Review 399 (1993), pp. 416-417.

³⁹⁴ Sean D Murphy (2004), pp. 422-423.

governmental initiatives that reinforce the value and benefits of the voluntary codes to [MNEs] (in other words, creating "carrots"), while at the same time holding [MNEs] to the codes to which they have subscribed (creating "sticks"). If only carrots are created, more [MNEs] may be pulled into the adoption of corporate codes, but with spotty adherence. If only sticks are created, [MNE]s may view the adoption of codes as undesirable burdens.³⁹⁵

According to this author, solutions might involve State intervention, aimed at: (1) convening the relevant stakeholders; (2) establishing a 'code for codes', which would serve as a template for quality control; (3) using CSR codes as justification for favourable treatment of a company, whether in terms of criminal or civil prosecution, thus encouraging compliance; (4) subjecting government procurement and financing to requirements linked with CSR codes; (5) promoting transparency and regulating false advertising by companies regarding their social conduct; and, lastly, (6) promoting effective monitoring.³⁹⁶

In light of the above, it appears possible to conclude that, however flawed CSR codes may be at present, the solution for the problems pointed out by critics cannot be one of legalisation of corporate codes of conduct. There is more to gain from complementarity of strategies, which indicates that a balanced use of a combination of hard and soft law might be the answer in a world that is still not prepared (politically or economically) for a legal environment constituted only by binding norms regulating CSR. The next section will take the issue further, analysing the relationship between voluntary initiatives and legal measures.

1.2. Voluntarism and the law

Western liberal democratic theories had a very heavy influence on the way human rights were shaped under public international law. Positivist approaches to HRL meant that the focus has historically been placed on the relationship between State and individual human rights holders, leaving businesses largely unaccountable for activities that negatively impacted the human rights of stakeholders. The CSR discourse came to challenge this notion, by asking:

³⁹⁵ *Idem*, p. 424.

³⁹⁶ *Idem*, pp. 424-432.

*[I]s the protection of human rights the exclusive domain of states, leaving businesses free to seek their profits solely on the basis of the legal rules of states or do human rights constitute a normative order from which business cannot claim exemption on the basis of inadequate state protection of human rights?*³⁹⁷

It is crucial to establish from the beginning that voluntary initiatives and legal measures are not necessarily at opposite ends of the spectrum. In fact, back in 1979, Carroll had already defined CSR as including a legal dimension.³⁹⁸ As Former UN Special Representative on Business and Human Rights John Ruggie points out in his report, States ‘should consider a *smart mix of measures* – national and international, mandatory and voluntary – to foster business respect for human rights.’³⁹⁹ Voluntary initiatives can complement legal measures, by using the power of the market to expand the toolkit available to businesses and society, in order to ‘embed [CSR] in business decisions’⁴⁰⁰ and achieve greater levels of sustainability.

In fact, the main reason why voluntary conduct codes should be encouraged lies in the possibility of redefining corporate goals so as to include non-economic concerns in business strategy, to redefine and reconceptualise ‘profits’. As Wynhoven and Aftab point out, ‘[t]o many observers, responsible corporate behaviour is simply the result of business recognizing that [CSR] is necessary to protect and advance its financial bottom line. (...) But if [CSR] is only undertaken for profit maximization, there is little need for a theory; companies will happen across it in any event as they pursue profits.’⁴⁰¹ This means that there is a possibility that CSR concerns become endogenous to business, much like profit, and therefore the need for legislative measures progressively lowers as MNEs integrate non-economic social concerns in their corporate goals. Following this line of reasoning, it is possible to infer that society will also incorporate CSR in their expectations towards business, and therefore demand a more sustainable conduct from MNEs. Indeed, voluntary conduct codes and their adoption by certain companies provide a standard against which society

³⁹⁷ Karin Buhmann et al., ‘Introduction’ in Karin Buhmann et al. (eds), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Palgrave Macmillan 2011), p. 8.

³⁹⁸ Archie B Carroll (1979), pp. 499-500.

³⁹⁹ Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (A/HRC/17/31) (21 March 2011), p. 8 (emphasis added).

⁴⁰⁰ Ursula Wynhoven and Yousuf Aftab (2015), p. 235.

⁴⁰¹ *Idem*, p. 236.

can judge other companies' conduct; hence the heightened possibility that society will exert pressure over MNEs to integrate CSR in their business strategies, mainly through public opinion and market behaviour.

When MNEs view CSR as a cost or constraint, there is a danger that they will find it difficult to establish what should be done, even if the risks of social impact are identified and assessed. This leads to the establishment of corporate policies that are 'neither strategic nor operational but cosmetic: public relations and media campaigns, the centrepieces of which are often glossy CSR reports that showcase companies' social and environmental good deeds.'⁴⁰²

However, it is important to note that voluntary conduct codes do provide companies with guidance regarding the implementation of CSR objectives, and they do have the potential to redefine corporate behaviour through practice. According to Wynhoven and Aftab, this potential can be exemplified by the emergence of a productive dialogue amongst stakeholders; by the possibility of adopting flexible approaches to CSR and developing tailored strategies; by fostering cooperation with stakeholders and other businesses, which can lead to lower risks and costs in the adoption of CSR standards; and by providing space for dialogue and cooperation that regulation alone cannot achieve.⁴⁰³

When comparing legal and voluntary mechanisms for the protection of human rights, one has to take into account the shortcomings of regulation. As Sen points out, 'the entirely legal routes to understanding human rights are not only misleading, they may also be foundationally mistaken. The different legal routes that have been suggested (...) all suffer from being either misdirected or seriously incomplete.'⁴⁰⁴ This is in line with the thought of Ruggie, who affirmed that 'any successful regime needs to motivate, activate, and benefit from all of the moral, social, and economic rationales that can affect the behavior of corporations.'⁴⁰⁵

Voluntary corporate conduct codes have raised an important debate between 'voluntarists' and 'obligationists' – the first arguing that voluntary initiatives are the most effective way of protecting and promoting human rights, whereas the second

⁴⁰² Michael E Porter and Mark R Kramer (2006), p. 2.

⁴⁰³ Ursula Wynhoven and Yousuf Aftab (2015), pp. 240-241.

⁴⁰⁴ Amartya Sen, '*Human rights and the limits of law*', 27 *Cardozo L Rev* 2913 (2005), p. 2914.

⁴⁰⁵ John Gerard Ruggie, '*Business and human rights: the evolving international agenda*', 101 *The American Journal of International Law* 819 (2007), p. 839.

believe that only binding rules can achieve that goal.⁴⁰⁶ Of course, not every commentator that has approached the subject can be labelled as simply one or the other, since many authors opt for nuanced versions of each theory. A full account of this debate is outside the scope of the present research, but it is still important to observe that even diametrically opposed theories can be reconciled.

Additionally, it is crucial to take into account that CSR is increasingly within the legal realm: several governments, including the UK, have established legal provisions that require reporting on non-economic matters, namely on the impact businesses have on society and the environment.^{407,408}

In sum, voluntarism is a desirable complement to legislative activity, especially when considering the flexibility and opportunities that CSR offers. As Wynhoven and Aftab correctly state, 'voluntarism will always be necessary to ensure that business is aspiring to adopt the spirit of the obligation in good faith even if law is passed.'⁴⁰⁹ Legal norms need to be complemented by 'a dialogue-based approach' that pays deference to the fact that 'most companies still have a lot to learn when it comes to managing social, environmental and governance issues.'⁴¹⁰ To quote Vogel,

*If companies are serious about acting more responsibly, then they need to re-examine their relationship to government as well as improve their own practices. And those who want corporations to be more virtuous should expect firms to act more responsibly on both dimensions. Civil and government regulation both have a legitimate role to play in improving public welfare. The former reflects the potential of the market for virtue; the latter recognizes its limits.*⁴¹¹

⁴⁰⁶ Leandro Martins Zanitelli (2011), p. 40.

⁴⁰⁷ In this regard, see, *inter alia*, David Williamson and Gary Lynch-Wood, 'Social and environmental reporting in UK company law and the issue of legitimacy', 8 Corporate Governance: The international journal of business in society 128 (2008).

⁴⁰⁸ In addition, it should also be noted that, in the UK, in order for a company to be listed on the London Stock Exchange, it has to comply with the UK Corporate Governance Code (previously, the Combined Code, comprising the Code on Corporate Governance and the Code of Best Practice) or present adequate reasons for noncompliance ('comply or explain'). In this sense, see London Stock Exchange, 'Corporate Governance for Main Market and AIM Companies' (2012), available at: <http://www.londonstockexchange.com/companies-and-advisors/aim/publications/documents/corpgov.pdf>.

⁴⁰⁹ Ursula Wynhoven and Yousuf Aftab (2015), p. 243.

⁴¹⁰ Andreas Rasche, 'A Necessary Supplement' - What the United Nations Global Compact Is (and Is Not) in Karin Buhmann et al. (eds), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Palgrave Macmillan 2011), p. 55.

⁴¹¹ David Vogel, *The market for virtue: The potential and limits of corporate social responsibility* (Brookings Institution Press 2005), p. 173.

1.3. Multi-stakeholder initiatives

As mentioned above, according to Ruggie, there is a considerable governance gap ‘between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences’,⁴¹² caused by globalisation. One of the solutions that have been put forth regarding the bridging of this gap is the creation of multi-stakeholder initiatives (hereinafter, MSIs), a mechanism that has now been largely adopted in mainstream CSR. MSIs ‘bring together stakeholders concerned about the negative impacts of an industry on particular communities (...) and (...) have now been embraced by most major global industries, setting standards and establishing frameworks to tackle a myriad of issues that formal domestic and international legal regimes have left unaddressed.’⁴¹³ The UN has confirmed the importance of MSIs, as this kind of initiative was included in the Guiding Principles on Business and Human Rights (hereinafter, the Guiding Principles).⁴¹⁴

MSIs are instruments through which several different stakeholders, such as governments, businesses and civil society, collaborate in order to tackle the externalities of transnational business enterprises. The conceptual and theoretical framework for MSIs is, however, underdeveloped.⁴¹⁵

According to Evans, first-generation MSIs began with conflicts between different stakeholders, which put significant pressure on businesses to adopt some sort of voluntary conduct code. Examples of this type of MSIs are the World Commission on Dams (formed in 1997 as a response to serious confrontation with NGOs and local communities negatively affected by the funding and building of dams); the Fair Labour Association (born out of strong campaigns against the use of sweatshop labour by apparel companies); the Voluntary Principles on Security and Human Rights (resulting from persistent lobbying by NGOs against oil companies); and the

⁴¹² Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - Business and human rights: Towards operationalizing the “Protect, Respect and Remedy” Framework (A/HRC/11/13) (22 April 2009), p. 5.

⁴¹³ Amelia Evans, ‘Multistakeholder Initiative Anatomy - Understanding Institutional Design and Development’ in Charlotte Walker-Said and John D. Kelly (eds), *Human Rights in the New Global Economy - Corporate Social Responsibility?* (The University of Chicago Press 2015), p. 213.

⁴¹⁴ Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (A/HRC/17/31) (21 March 2011), Guiding Principles 23 and 30.

⁴¹⁵ Amelia Evans (2015), p. 214.

Kimberley Process (developed after a fierce NGO campaign against blood diamonds).⁴¹⁶

More recent examples of MSIs are further away from the conflict-based origins, rather stemming from a consensus amongst stakeholders regarding an issue that ‘is not on the global agenda, but should be.’⁴¹⁷ For example, the Global Reporting Initiative (GRI) was founded in the US in 1997, rooted in two environmental NGOs, with the involvement of the United Nations Environment Programme (UNEP). The GRI provides standards on sustainability reporting and disclosure, regarding matters such as climate change, human rights and corruption. It was developed with the purpose of creating an accountability mechanism to guarantee that companies were adopting a responsible environmental conduct. Rather than being born out of contestation and conflict, the GRI resulted from a generalised acknowledgment of its usefulness, as several companies chose to join the pilot programme and decided to adopt standardised reporting guidelines.⁴¹⁸ The category of MSIs that were not born out of a specific conflict also includes the UN Global Compact, the world’s largest voluntary corporate conduct code, which will be analysed in detail in Section 2 below.

Regardless of whether MSIs are born out of conflict or mere collective acknowledgment of a problem, truth is they facilitate the dialogue and build bridges between those who are interested in regulation and those who are to be regulated. On a different perspective, critics of MSIs defend that, beyond the facilitation of dialogue, there is little practical evidence that these initiatives promote effective change. It should be added that where external pressure to comply diminishes or disappears, businesses are less likely to promote structural change regarding human rights. Furthermore, companies are likely to form or join an MSI for less than honourable reasons, including the avoidance of stricter regulation or the minimisation of NGO confrontation.⁴¹⁹

The scope of MSIs is determined by the standards that they develop, rather than by a formalistic analysis of their stated mission. Whereas some MSIs base their standards on international law, thus imprinting them with added legitimacy, several others use weak language in their standards. It should be noted that, whilst joining an

⁴¹⁶ *Idem*, p. 215.

⁴¹⁷ *Ibidem*.

⁴¹⁸ See the GRI website: <https://www.globalreporting.org/>; the origins of this MSI are also explained by Amelia Evans (2015), pp. 215-216.

⁴¹⁹ Amelia Evans (2015), p. 217.

MSI is voluntary, once a company has joined it is expected to comply with the relevant standards. As Evans explains, '[o]bligatoriness provides an indispensable form of credibility for MSIs'.⁴²⁰

One of the most important critiques raised against MSIs refers to the range of stakeholders they generally include. Whilst most of them comprise high-profile global stakeholders, it is much less likely that they will include less powerful members, such as representatives of specific local communities and the vulnerable groups within them, local and national NGOs and stakeholders from the global South.⁴²¹

1.4. In focus: business responsibility for human rights

In recent years, most of the CSR discourse has been geared towards environmental concerns, such as climate change.⁴²² The discussion about business responsibilities over human rights has been a heated one, extending from whether human rights considerations should be a business concern at all to the idea that all companies should be subject to national and international HRL.⁴²³

The UN attempted to regulate CSR within a HRL framework in 2004, with the presentation by the Sub-Commission of the (then) UN Commission on Human Rights of the 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'. The fact that the Norms established binding obligations was fiercely opposed by businesses, and this project eventually failed.

In 2008, however, John Ruggie presented the "Protect, Respect and Remedy" Framework to the Human Rights Council (HRC). The Framework was unanimously welcomed in that same year, and operationalized in 2011 with the adoption of the Guiding Principles on Business and Human Rights,⁴²⁴ which meant that, finally, the UN had an official position on the subject of CSR, based on three essential pillars: (1)

⁴²⁰ *Idem*, p. 219.

⁴²¹ *Idem*, p. 223.

⁴²² Karin Buhmann et al. (2011), p. 2.

⁴²³ This matter is also intimately connected to the issue of horizontal effect of human rights law, an issue which is beyond the scope of this research. See, *inter alia*, John H Knox, 'Horizontal human rights law' *American Journal of International Law* 1 (2008); Elena Pariotti, 'International soft law, human rights and non-state actors: towards the accountability of transnational corporations?', 10 *Human Rights Review* 139 (2009); and Leandro Martins Zanitelli (2011).

⁴²⁴ On this occasion, the UN Human Rights Council also established the UN Working Group on business and human rights.

the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; (2) the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and (3) greater access by victims to effective remedy, both judicial and non-judicial.^{425,426}

It is important to highlight that the semantic distinction drawn in the Guiding Principles between the ‘duties’ of states and the ‘responsibilities’ of corporations is significant, both in legal and political terms. The choice of words is supposed to highlight the difference between legal and moral obligations, as a result of the current state of international law. As Ruggie explains,

*The term “responsibility” to respect, rather than “duty”, is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws. At the international level, the corporate responsibility to respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Council itself.*⁴²⁷

At both a philosophical and normative level, the establishment of such distinction has been criticised and named as ‘confusing’,⁴²⁸ with some commentators arguing that ‘it is counter-intuitive at best and misleading at worst to limit the scope of duty to the legal and that of responsibility to the non-legal realm at the outset.’⁴²⁹

⁴²⁵ UN, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (7 April 2008), paragraph 9.

⁴²⁶ This research will focus mainly on the second and third aspects of the Framework, i.e., corporate responsibility and enforcement. The first aspect – State obligations – is approached in detail in Sara L. Seck, ‘Conceptualizing the Home State Duty to Protect Human Rights’ in Karin Buhmann et al. (eds), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Palgrave Macmillan 2011).

⁴²⁷ See *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework*, UN Doc. A/HRC/14/27 (9 April 2010), paragraph 55.

⁴²⁸ Robert McCorquodale, *Corporate social responsibility and international human rights law*, 87(2) *Journal of Business Ethics* 385 (2009), p. 391.

⁴²⁹ Florian Wettstein, Normativity, *Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment*, *Journal of Human Rights* 14(2), 162-182 (2015), available at: https://www.alexandria.unisg.ch/242858/1/Wettstein%20-%20Normativity%2C%20Ethics%20and%20UN%20GPs_JHR.pdf, p. 9.

The Guiding Principles are today seen as ‘the benchmark for business respect for human rights.’⁴³⁰ They establish corporate responsibility for human rights as complementary to, but independent from, States’ human rights obligations:

*The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.*⁴³¹

According to this paragraph, there are two essential points to corporate responsibility: first of all, business enterprises are responsible for respecting human rights (which is a considerable departure from the classic, State-centric conception of human rights); second, this responsibility does not depend on States’ compliance with human rights obligations – ‘at least morally, [it] transcends any national limitations in passage or enforcement of human rights law.’⁴³² Finally, it should be noted that the Guiding Principles have officially been incorporated into the OECD Guidelines for Multinational Enterprises, in 2011.⁴³³

Even though the ‘CSR agenda’ progressively expanded over the years, thus encompassing more and more social issues, commentators affirm that ‘major blind spots remained’.⁴³⁴ In fact, ‘concrete measures and progress to address both labour rights and the broader category of human rights were limited.’⁴³⁵ Nevertheless, there is massive potential for the development of more comprehensive solutions, especially when taking into account that social pressure and expectations are important drivers for the emergence of soft law mechanisms,⁴³⁶ which, in turn, may lead to the adoption of domestic and international hard law standards,⁴³⁷ thus contributing to a more complete and thorough protection of human rights.

⁴³⁰ Ursula Wynhoven and Yousuf Aftab (2015), p. 232.

⁴³¹ Guiding Principles, commentary to Section II(A), Principle 11.

⁴³² Ursula Wynhoven and Yousuf Aftab (2015), p. 233.

⁴³³ See section IV of the OECD Guidelines.

⁴³⁴ Peter Utting and José Carlos Marques, ‘Introduction: The Intellectual Crisis of CSR’ in Peter Utting and José Carlos Marques (eds), *Corporate Social Responsibility and Regulatory Governance - Towards Inclusive Development?* (Palgrave Macmillan 2013), p. 2.

⁴³⁵ *Ibidem*.

⁴³⁶ For an interesting insight into social pressure and expectations, particularly in the extractive industries, see David Vogel (2005), chapter 6.

⁴³⁷ For an assessment of the viability of hard law in this context, see Lee McConnell, ‘Assessing the feasibility of a business and human rights treaty’, 66 ICLQ 143 (2017).

2. The UN Global Compact

The idea behind the UNGC came from a policy speech by Mr. Kofi Annan, then Secretary-General of the UN, in which he urged the World Economic Forum in Davos, Switzerland, to think about getting involved in a 'creative partnership between the United Nations and the private sector.'⁴³⁸ The UNGC was born out of a situation of crisis affecting two major international players: the UN and corporations. Through this initiative, the UN expected to be able to reach out to non-State actors, and through that expansion of its influence, it hoped to 'revive and reinvent its relevance on the global stage.'⁴³⁹ The creation of the UNGC thus appeared as an attempt at managing the governance gaps brought about by globalisation, whilst acknowledging that the UN would be unable to effectively fulfil its goals with only the support of States. The initiative, therefore, embodied the recognition of the growing power and influence of MNEs and the need to involve them in global sustainability efforts. On the other hand, corporations also needed the UN to help face the difficulties caused by growing public concerns with corporate governance, as well as the stark opposition to a number of practices by NGOs and civil society in general.⁴⁴⁰

According to Ruggie, the UNGC came as an attempt to 'embed the behaviour of business in the universal principles of the United Nations' in cooperation with stakeholders, including labour, civil society, national governments and local authorities, so as to 'weave a web of values around the global marketplace.'⁴⁴¹ From inception, it was not meant to constitute a legally binding regulatory framework, but rather a 'social learning network (...) intended to identify, disseminate and promote good practices based on universal principles.'⁴⁴²

Today, the UNGC is the world's largest and most significant MSI, counting with the participation of over 8,000 companies and close to 5,000 non-businesses (including NGOs and public organisations), based in over 160 countries. There are Global Compact Local Networks in over 85 countries, which serve the purpose of liaising with companies, so as to act on sustainability issues at the local level.

⁴³⁸ Address of Secretary-General Kofi Annan to the World Economic Forum in Davos, Switzerland, 31 January 1999, available at: <http://www.un.org/press/en/1999/19990201.sgsm6881.html>.

⁴³⁹ Surya Deva, 'Global Compact: A Critique of the UN's public-private partnership for promoting corporate citizenship', 34 Syracuse J Int'l L & Com 107 (2006), p. 109.

⁴⁴⁰ *Idem*, pp. 109-110.

⁴⁴¹ John Gerard Ruggie, 'Trade, sustainability and global governance', 27 Colum J Envtl L 297 (2002), p. 301.

⁴⁴² *Ibidem*.

Since the formal launch of the programme in New York, on 26 July 2000, the UNGC has been both highly praised and heavily criticised. Whilst reports point to a high level of success (e.g., McKinsey concluded that 9 out of 10 corporate leaders were doing more in 2007 than they had 5 years before, to incorporate environmental, social, and political issues into their firms' core strategies),⁴⁴³ the programme has also received harsh criticism from scholars, the press, NGOs, intergovernmental agencies and some developing countries (which will be analysed in Section 2.3 below).

However, in order to identify the benefits and shortcomings of the programme and to assess its effectiveness, it is important to understand, first and foremost, what the programme aims to achieve and which values and principles it seeks to promote, as well as how it works in practice.

2.1. The goals and mission of the UN Global Compact

Throughout the documentation issued by the UNGC, the objectives of the programme are affirmed as the engagement of businesses on (1) implementing the ten principles of the UNGC into business operations; and (2) taking actions in support of UN goals and issues. As Rasche points out, the goals of the UNGC can be grouped into two distinct sets: at the macro level, it is meant to facilitate cooperation, long-term learning and collective problem solving amongst stakeholders; at the micro level, it promotes the internalisation of its principles into participants' strategies and activities.⁴⁴⁴ Deva adds that, '[a]t a wider level, the vision of the Global Compact is "to promote responsible corporate citizenship so that business can be part of the solution to the challenges of globalization," e.g., good corporate citizenship could contribute to establishing a "more sustainable and inclusive global economy".'⁴⁴⁵

The UNGC establishes ten principles⁴⁴⁶ inspired by four international agreements: the UDHR, the ILO Fundamental Principles and Rights at Work,⁴⁴⁷ the Rio Declaration

⁴⁴³ McKinsey & Company, *Shaping the New Rules of Competition: UN Global Compact Participant Mirror* (2007), available at: https://www.unglobalcompact.org/docs/news_events/8.1/McKinsey.pdf.

⁴⁴⁴ Andreas Rasche (2011), p. 55.

⁴⁴⁵ Surya Deva (2006), p. 116 (references omitted).

⁴⁴⁶ Originally nine principles, in the fields of human rights, labour and environment. In 2004, a tenth principle related to anti-corruption was added, during the Global Compact Leaders Summit.

⁴⁴⁷ Available at: <http://www.ilo.org/declaration/lang--en/index.htm>.

on Environment and Development,⁴⁴⁸ and the UN Convention Against Corruption.⁴⁴⁹ They cover human rights, labour, environment and anti-corruption. The first two principles establish that businesses should support and respect the protection of internationally proclaimed human rights and make sure that they are not complicit in human rights abuses. It should be noted that the UNGC relies to a great extent on the Guiding Principles, which, '[a]s a global standard applicable to all business enterprises, (...) provide further conceptual and operational clarity for the two human rights principles championed by the [UNGC]. They reinforce the [UNGC] and provide an authoritative framework for participants on the policies and processes they should implement in order to ensure that they meet their responsibility to respect human rights.'⁴⁵⁰

These principles are the foundation for a programme that does not aim to bring about certification; the UNGC is not a regulatory instrument and it does not apply sanctions to its participants in case of noncompliance. Rather, it is a learning tool, directed to the construction of effective dialogue amongst stakeholders, thus implementing an idea of 'principled pragmatism'.⁴⁵¹ According to this idea, a balance should be sought between what ideally should be accomplished through regulation with what can realistically be attained in a specific political and social environment. Therefore, MNEs are encouraged to be transparent about their participation in the programme, reporting on their action and on the development of their governance policies. Once again, this kind of initiative does not preclude the need for regulation; it is rather a welcome complement to binding norms, acknowledging that most MNEs still need to undertake a serious learning process regarding sustainable governance issues.⁴⁵²

2.2. How the programme works

In order to understand how the UNGC works, it is necessary, first of all, to point out the actors involved in the programme, to describe what participation means to

⁴⁴⁸ Available at:

<http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>.

⁴⁴⁹ Available at: <https://www.unodc.org/unodc/en/treaties/CAC/>.

⁴⁵⁰ Cf. UN Global Compact, 'The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments', July 2011 (Updated June 2014), available at: https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf.

⁴⁵¹ Andreas Rasche (2011), p. 55.

⁴⁵² *Ibidem*.

corporations and, finally, to assess the engagement mechanisms through which the initiative's goals are sought.

There are essentially four actors involved in the UNGC network: (1) the UN, with the relevant offices and agencies; (2) businesses; (3) governments; and (4) civil society and labour (including NGOs and international trade unions).

The governance of the UNGC is shared amongst (1) the Triennial Global Compact Leaders Summit; (2) the Global Compact Board; (3) Local Networks; (4) Annual Local Networks Forum; (5) the Global Compact Headquarters (including the Global Compact Office and the Foundation for the Global Compact, integrated in the UN Secretary-General's Executive Office); and (6) the Global Compact Government Group and the Friends of the Global Compact (the first is comprised of governments that contribute to the initiative and convene biannually to review budgets and progress; the second is a group of representatives from Missions to the UN in New York that convene around four times annually to receive briefings on the progress of the UNGC).

The Global Compact Board is composed of twenty members from four constituent actors (three from the UN, eleven from business, four from civil society and two from labour) and is responsible for providing strategic and policy advice to the programme, including recommendations to the Global Compact Office, participants and other stakeholders. The UN is represented in the Board by the Secretary-General, the Head of the Compact Office and the Chair of the Global Compact Foundation.

The role of the Inter-Agency Team should also be taken into consideration. It counts with the participation of seven UN agencies: the Office of the UN High Commissioner for Human Rights (OHCHR), the ILO, the UNEP, the UN Office on Drugs and Crime (UNODC), the UN Development Programme (UNDP), the UN Industrial Development Organization (UNIDO) and the UN Entity for Women and Gender Empowerment.

In order to take part in the programme, the Chief Executive Officer (hereinafter, CEO) of a given company has to write a letter to the UN Secretary-General expressing their interest in the initiative and their support for the values and principles that the UNGC embodies.⁴⁵³

⁴⁵³ Surya Deva (2006), p. 115.

According to the Global Compact Office, companies joining the initiative are expected to: (1) make the programme and its principles an integral part of their business strategy, day-to-day operations, and organisational culture; (2) incorporate the UNGC and its principles in the decision-making processes of the highest-level governance body; (3) take actions in support of UN goals and issues, including the Sustainable Development Goals (SDGs);⁴⁵⁴ (4) report annually on progress made to implement the principles, ideally integrated into the annual report (the 'Communication on Progress' – or COP – policy); and (5) advance the initiative and the case for responsible business practices through advocacy and active outreach to all stakeholders and the public at large. Participating companies are also invited to make a financial contribution to the initiative every year.⁴⁵⁵

The COP policy is arguably the most important part of the obligations that participants commit to upon signature to the UNGC.⁴⁵⁶ A COP is a public communication to all stakeholders (including consumers, employees, organised labour, civil society, investors, media and government) which reports on how each company has implemented the ten principles in their strategy and operations and how it has contributed to the advancement of UN goals through partnerships, if relevant. The COP policy is rooted upon the concepts of transparency, public accountability and continuous improvement.⁴⁵⁷

Participating companies are expected to submit their first COP to the UNGC database within one year of signature. If a company fails to submit their report, it will be marked as 'non-communicating'; if it still does not submit a COP within one year of being marked as 'non-communicating', it will be expelled from the programme.

⁴⁵⁴ There were eight Millennium Development Goals to be attained by 2015, ranging from halving extreme poverty rates to halting the spread of HIV/AIDS and providing universal primary education. A new post-2015 development agenda was developed by the UN, resulting in the approval of 17 SDGs, covering poverty, education, health, energy, climate change, peace and justice and others, all explained in the SDGs website: <http://www.un.org/sustainabledevelopment/>. The new sustainable development agenda was approved through the Draft outcome document of the UN summit for the adoption of the post-2015 development agenda, UN Doc. A/69/L.85, on 12 August 2015. Countries also adopted a global agreement on climate change, through Draft decision -/CP.21, Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/L.9/Rev.1, dated 12 December 2015. Both are available at the SDGs website (referred above).

⁴⁵⁵ Global Compact Office, 'After the Signature – A Guide to Engagement in the Global Compact' (2008), available at: https://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf, p. 7 (hereinafter, 'Guide to Engagement').

⁴⁵⁶ Although crucial to the programme, the details surrounding the COP policy will not be explored in this research. For a detailed analysis, see, *inter alia*, Surya Deva (2006), pp. 120-122.

⁴⁵⁷ Global Compact Office, 'Guide to Engagement' (2008), p. 19.

In 2013, non-business participants in the UNGC (such as NGOs, business associations, public sector organisations, academics and others) were also invited to start reporting every two years, through a Communication on Engagement (COE), whereby they publicly disclose to stakeholders the activities undertaken to support the programme and the ten principles. There are three minimum requirements for the COE: (1) participants should present a declaration from their CEO stating their continued support for the programme and renewing their commitment; (2) the COE should contain a description of the activities taken in support of the programme and the ten principles; and, finally, (3) participants should present a measurement of outcomes. Similarly to what ensues should a business fail to submit a COP, non-business participants who fail to submit a COE will be marked as 'non-communicating'; if they do not do so within one year of being marked as 'non-communicating', they will be expelled from the programme.

As far as how participants can engage with the initiative, companies have access to several ways to go beyond the implementation of the ten principles in their corporate strategy and operations. The first option is the creation of partnerships with stakeholders to advance development goals, such as the SDGs. According to the Global Compact Office:

*The basic concept of partnerships is simple and straightforward – to identify common ground between the private and the public sectors, and to combine their resources, skills and expertise to improve results. Partnerships focus on the many areas where private actors and public institutions can engage in win-win relationships, such as poverty reduction, health, education and community development.*⁴⁵⁸

Partnerships can take the form of advocacy and policy dialogue, social investment and philanthropy, or core business (tackling sustainability challenges through the creation of employment, advancement of entrepreneurship, attainment of economic growth, generation of tax revenues, implementation of social, environmental or ethical standards, and provision of appropriate and affordable goods and services)⁴⁵⁹ and they can occur both at the local/regional level and at the global level.

⁴⁵⁸ *Idem*, p. 23.

⁴⁵⁹ *Ibidem*.

At the local level, the most relevant structure is that of Local Networks. The Global Compact Office characterises these networks as ‘the most important vehicle for increasing and intensifying the impact of the initiative – by providing on-the-ground support and capacity-building tied to different cultural needs.’⁴⁶⁰ Local networks are expected to promote learning and dialogue, as well as to fundraise and produce an Annual Activities Report. As Rasche affirms,

*Local networks serve as a platform to create a close link between contextualised problems at the local level and the more abstract ideas and commitments that are developed at the global level. Networks are ‘translators’ of the created global solutions and, at the same time, ‘innovators’ looking for ways to implement the ten principles given the constraints and opportunities of a local context.*⁴⁶¹

Besides these two main routes, UNGC participants should also engage in advocacy and raising awareness; collective action (with successful examples, such as the Extractive Industries Transparency Initiative (EITI)⁴⁶² and the Global Business Initiative on Human Rights (GBI),⁴⁶³ or the Voluntary Principles on Security and Human Rights)⁴⁶⁴; and the engagement of companies’ subsidiaries.

Finally, the UNGC links its constituent actors through two very important learning and dialogue fora, which focus on identifying and discussing issues related to the ten principles and reinforcing the relationships between actors: policy dialogues (meetings at the global level, ‘for mutual understanding and problem-solving’⁴⁶⁵) and the Global Compact Leaders Summit (triennial meeting, chaired by the UN Secretary-General, that gathers ‘top executives from participating businesses, heads of international labour, civil society and United Nations agencies, as well as high-ranking government officials to discuss both progress made and chart the future strategic course of the initiative’.⁴⁶⁶

In sum, the engagement mechanisms available to participants in the UNGC can be grouped into four categories: (1) leadership (that is, promoting and disseminating the

⁴⁶⁰ *Idem*, p. 24.

⁴⁶¹ Andreas Rasche (2011), p. 59.

⁴⁶² The website for the EITI provides abundant information on this collective action initiative: <https://eiti.org>.

⁴⁶³ See <http://www.global-business-initiative.org>.

⁴⁶⁴ See <http://www.voluntaryprinciples.org>.

⁴⁶⁵ Global Compact Office, ‘Guide to Engagement’ (2008), p. 26.

⁴⁶⁶ *Ibidem*.

values of the programme at all levels, through public commitment); (2) dialogues (communicating and discussing issues related to the Compact with all stakeholders); (3) learning (sharing experiences, examples and case-studies so as to promote the dissemination of best business practices); and (4) outreach/network (establishing platforms for action, including public-private partnership programmes).⁴⁶⁷

2.3. The benefits and shortcomings of the initiative

Although a full analysis of the benefits and shortcomings of the UNGC is outside the scope of this research, it is still worth pointing out the most common criticism made to the initiative.

First, several authors argue that the UNGC contributes to a takeover of the UN by 'big business', that is, that the interests of MNEs might be pursued through and within the UN, or that companies might be able to exert undue influence on UN bodies:

*On the one hand, [critics] maintain that the Global Compact aggravates the inequalities of development and widens the gulf between North and South. On the other hand, they contend that by giving greater power to the private sector, the Compact tramples on the democratic principles that should underpin the management of the international economic order.*⁴⁶⁸

Thérien and Pouliot state that this criticism has been heightened by several factors, namely 'the widespread perception that it epitomizes a regrettable ideological shift on the part of the UN', that the UNGC furthers a 'pro-market spin', and that a 'privatization of the development process' could render governments less willing to dedicate their efforts to social issues.⁴⁶⁹ Conversely, Rasche affirms that 'the Global Compact is by no means the first, nor the only attempt to establish partnerships between the UN and business.'⁴⁷⁰ In this author's view, these partnerships are actually desirable, since the UN no longer has the ability to pursue its goals in isolation; in addition, he believes

⁴⁶⁷ In this sense, see Surya Deva (2006), p. 116.

⁴⁶⁸ Jean-Philippe Thérien and Vincent Pouliot, 'The global compact: shifting the politics of international development?', 12 *Global Governance: A Review of Multilateralism and International Organizations* 55 (2006), p. 66.

⁴⁶⁹ *Idem*, p. 67.

⁴⁷⁰ Andreas Rasche (2011), p. 62.

that there is 'no basic inconsistency between the goals of business and the UN', as both desire a stable and sustainable global market which is rooted in shared values.⁴⁷¹

Petersmann, on the other hand, rather than criticising this partnership, calls for a complementary UNGC involving UN specialised agencies, the WTO and other intergovernmental organisations, so as to build 'a new human rights culture and a citizen-oriented national and international constitutional framework different from the power-oriented, state-centred conceptions of traditional international law.'⁴⁷²

A second type of criticism raised against the UNGC lies in the claim that the ten principles are vague and therefore difficult to implement. Nolan argued that the vagueness of both the content and scope of the principles renders them unsuitable to provide a solid basis for enforceable standards. She adds that terms such as 'sphere of influence', used to define the scope of companies' human rights responsibilities, lacks definition and clarity, therefore leaving it open to interpretation and a wide margin of discretion which might compromise the effectiveness of the initiative. She adds that this vagueness turns business human rights responsibility into a 'polite request to respect rights'.⁴⁷³ Deva similarly points to the dangers of the vagueness of the principles:

*The generality-cum-vagueness of the Compact principles is counter-productive from the perspective of both sincere and insincere corporate citizens. The language of these principles is so general that insincere corporations can easily circumvent or comply with them without doing anything to promote human rights or labor standards. On the other hand, even a sincere corporate citizen (...) finds the language too general to be implemented (...).*⁴⁷⁴

Rasche once again attempts to counter such criticism, arguing that vagueness is the only option when faced with such variety in the features of participating businesses. In his opinion, it is necessary to 'contextualise' the ten principles within each business

⁴⁷¹ *Idem*, p. 63.

⁴⁷² Ernst-Ulrich Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 European Journal of International Law 621 (2002), p. 649.

⁴⁷³ Justine Nolan, 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?', 24 University of Queensland Law Journal (2005), pp. 461-462.

⁴⁷⁴ Surya Deva (2006), p. 129.

environment, and the values of the programme need to be 'translated into action, a task (...) that can be approached from different angles.'⁴⁷⁵

The third type of criticism voiced against the UNGC is linked to lack of accountability and verification. A 2003 joint letter from Amnesty International, Oxfam International, Lawyers Committee for Human Rights and Human Rights Watch,⁴⁷⁶ criticised the general lack of accountability of the programme and demanded more rigorous monitoring of companies' participation and reporting. In the same year, Prakash Sethi told *The Financial Express* that '[t]he Global Compact is another exercise in futility. It provides a venue for opportunistic companies to make grandiose statements of corporate citizenship without worrying about being called to account for their actions.'⁴⁷⁷

The critique regarding lack of accountability of the UNGC is the most prevalent in academic literature and the media. Nolan affirms that '[a]ccountability, or rather the lack of it, is the crucial issue that faces the Global Compact.'⁴⁷⁸ Deva links the lack of monitoring and enforcement mechanism with the misuse of the programme as 'a "marketing tool" to "bluewash" [the company's] reputation or image, or to gain undue sympathy from consumers and prospective shareholders or employees.'⁴⁷⁹ In other words, there is a significant concern that the companies most eager to take part in the UNGC are actually the ones more desperate for an improved public image, leading to a process of adverse selection.⁴⁸⁰ The introduction of the COP policy in 2003 was an attempt by the UN to counter this criticism, with the hope that enhancing reporting obligations would increase corporate accountability. According to Nolan, one of the biggest problems in regard to businesses' accountability for human rights violations under the UNGC lies in the fact that there are no reliable and sufficiently developed indicators to be used in the assessment of corporate action, contrary to what happens within the realm of environmental protection, which is much more advanced.⁴⁸¹

⁴⁷⁵ Andreas Rasche (2011), p. 65.

⁴⁷⁶ Amnesty International et al., 'Letter to Louise Fréchette Raising Concerns on UN Global Compact' (2003), available at: <https://www.globalpolicy.org/component/content/article/177/31749.html>.

⁴⁷⁷ Prakash Sethi, "Global Compact Is Another Exercise In Futility" *The Financial Express*, available at: <http://archive.financialexpress.com/news/-global-compact-is-another-exercise-in-futility-/91447/1>.

⁴⁷⁸ Justine Nolan (2005), p. 464.

⁴⁷⁹ Surya Deva (2006), p. 147.

⁴⁸⁰ In this sense, Andreas Rasche (2011), p. 66.

⁴⁸¹ Justine Nolan (2005), p. 465.

In defence of the initiative, Rasche points out that ‘one cannot and should not criticize the Compact for something it has never pretended or intended to be; a compliance-based mechanism that verifies and measures corporate behaviour.’⁴⁸² The author adds that the programme is ‘something in between’ full monitoring of corporate behaviour and no monitoring at all: it requires participants to report annually on progress. He also defends that verification might not actually be achievable due to: the difficulty in creating indicators that would be relevant across a wide variety of participants; the unlikelihood of obtaining support of the UN General Assembly to establish legally binding regulations; and the lack of logistical and financial resources to effectively monitor all participants, from MNEs and their supply chains and subsidiaries, to smaller enterprises all around the world.⁴⁸³

In addition, Rasche affirms that any critique of the UNGC, although necessary for the advancement of the programme, needs to (1) pay deference to the core ideas of the initiative, namely to its intent to foster a ‘long-term *learning* experience and not regulation’; and (2) take into account the institutional constraints that inform the UNGC.⁴⁸⁴ In this sense, and according to Ruggie, the UNGC ‘engages the private sector to work with the UN, in partnership with international labor and NGOs, to identify, disseminate, and promote good corporate practices based on (...) universal principles.’⁴⁸⁵ In addition, ‘[t]he Compact is not itself a regulatory instrument; *it is a social learning network*.’⁴⁸⁶

At this point, it is worth asking: why did the UN decide to adopt a voluntary programme, instead of a legally binding set of rules, much like the failed Norms? Ruggie presents three practical reasons: first, the very low probability of such a set of norms being adopted; second, the UN’s lack of logistical and financial capacity to monitor all relevant companies (from MNE’s and their supply chains to medium and small-sized businesses); third, binding rules would likely generate strong opposition from the business community, including those who are willing to participate in the Compact. In addition, Ruggie argues that the lack of consensus regarding a precise definition of the initiative’s principles is likely to impair the adoption of a ‘viable code of conduct’, and that these interpretational gaps can only be filled in through

⁴⁸² Andreas Rasche (2011), p. 66.

⁴⁸³ *Idem*, p. 67.

⁴⁸⁴ *Idem*, p. 53.

⁴⁸⁵ John Gerard Ruggie, ‘*Global governance.net: The Global Compact as learning network*’, 7 *Global Governance* 371 (2001), pp. 371-372.

⁴⁸⁶ John Gerard Ruggie, ‘*Trade, sustainability and global governance*’ (2002), p. 301 (emphasis added).

‘accumulated experience’. In addition, the Special Representative states that ‘the extraordinary pace of change’ of the business world would not be accommodated by a rigid framework, and benefits more from the flexibility accorded by the UNGC. Ruggie also points out that ‘the open-network architecture’ of the programme has the potential to promote the creation of several complementary initiatives, or even the association of existing initiatives with the UNGC. Finally, there is a very strong argument based on the programme’s potential to motivate the business world to accept ‘an evolution toward harder legal forms.’⁴⁸⁷

Ultimately, it is important to note that, regardless of the critique that has been made of the programme, the UNGC contributed to the growth and development of the UN itself, as it improved the engagement of private sector in the advancement of UN goals (such as the Millennium Development Goals and, more recently, the SDGs) and it opened the door to the imbuelement of UN values into the business strategies of very powerful MNEs.⁴⁸⁸

2.4. The UN Global Compact and indigenous peoples

The Global Compact Office directly addresses issues regarding indigenous peoples through reference guides, case examples and good practice notes. Throughout these documents, the initiative demonstrates concern with the impact businesses may have in the lives of indigenous peoples, as companies tend to increasingly operate in remote areas. There is also recognition of the particularly vulnerable position of indigenous peoples, who might see their human rights (including the rights to self-determination, property, health, development, and cultural life) compromised, due to their special relationship with the land, general lack of representation within the legal systems of host states, and pervasiveness of discrimination, abuse and marginalisation.

The Global Compact Business Reference Guide to the UNDRIP states that every business (regardless of size, sector, operational context, ownership or structure) has a responsibility to respect indigenous peoples rights, and it identifies two essential elements: the right to self-determination and free, prior and informed consent

⁴⁸⁷ *Idem*, pp. 303-304.

⁴⁸⁸ In this sense, see Georg Kell, ‘12 years later: Reflections on the growth of the UN Global Compact’, 52 *Business & Society* 31 (2013), p. 32.

(FPIC).⁴⁸⁹ It also establishes six fundamental actions to be performed by businesses: (1) adopting and implementing a formal policy; (2) conducting human rights due diligence; (3) consulting in good faith; (4) committing to obtain and maintain the FPIC of indigenous peoples; (5) remediating adverse impacts; and (6) establishing effective and culturally appropriate grievance mechanisms.⁴⁹⁰

UNGC participants are invited to act on two fronts: (1) corporate responsibility to protect; and (2) corporate responsibility to support. The first type of responsibility affirms that businesses should avoid causing or contributing to adverse human rights impacts, in addition to seeking to prevent or mitigate adverse human rights impacts directly linked to their operations, products or services by their business relationships and suppliers. The second refers to additional voluntary business actions that seek to promote and advance human rights.⁴⁹¹

a) Adopting and implementing a formal policy

Businesses are expected to adopt a formal policy regarding the rights of indigenous peoples, which materialises in a public statement and may be incorporated into a broader human rights policy or into an overall code of conduct. The policy may also include a commitment to supporting, promoting and advancing the rights of indigenous peoples. For this purpose, companies should comply with the requirements of Guiding Principle no. 16.⁴⁹²

Even though the Guiding Principles do not refer directly to the UNDRIP (nor do they approach the matter of FPIC), they require consideration of ‘additional standards’: ‘[f]or instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, UN instruments have elaborated further on the rights of indigenous peoples (...)’.⁴⁹³ The policy should thus

⁴⁸⁹ UN Global Compact, ‘Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples’ (2013), available at: https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf, p. 11.

⁴⁹⁰ *Ibidem*.

⁴⁹¹ *Idem*, p. 7.

⁴⁹² Guiding Principles, II (B)(16).

⁴⁹³ *Idem*, II (A)(12) Commentary.

refer to the relevant national, regional and international law on the rights of indigenous peoples, including the UNDRIP.

In certain cases, such as when the company's relationship with indigenous peoples requires specific provisions, the participation of indigenous representatives and human rights experts should be sought. When the policy is established, companies should require business partners to adhere to the policy and help implement it.⁴⁹⁴

The policy should establish a minimum standard that the company commits to meeting, even if the relevant national law does not require it to do so. It should include an outline of the procedure the company will use in order to seek indigenous peoples' consent. Finally, the policy should be flexible, so as to accommodate the traditional decision-making approach of the relevant indigenous peoples, but it should also ensure that marginalised groups (such as women and youth) are included in the process.⁴⁹⁵

The effective implementation of the policy should entail, *inter alia*, its dissemination amongst all personnel, business partners and other relevant parties; its integration in the company's training programmes; the establishment of mechanisms for accountability within the company and with contractors; regular data collection to enable monitoring; and on-going consultation with indigenous peoples. The policy should be widely available not only to the general public, but also to potentially affected indigenous groups, which means taking into account language and cultural differences, and translating it into indigenous or local languages. Widespread dissemination of the policy (through the internet, consultation and outreach meetings) is required. Finally, the policy cannot be static and should provide for mechanisms to ensure its revision, so as to adapt to changes in the issues it seeks to address.⁴⁹⁶

⁴⁹⁴ UN Global Compact, 'Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples' (2013), p. 12.

⁴⁹⁵ Amy K. Lehr, 'Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent - A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group on 20 February 2014' (2014), available at: https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/FPI_C_Indigenous_Peoples_GPN.pdf, pp. 11 and 16.

⁴⁹⁶ All of these issues are directly addressed in UN Global Compact, 'Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples' (2013), p. 14.

b) Conducting human rights due diligence

It appears clear that regular due diligence efforts may not be adequate to identify specific issues that affect indigenous peoples. There are essentially two reasons for this inadequacy: first, what does not affect local communities in general may adversely affect indigenous peoples, due to their particular culture and relationship with the land and nature; second, companies should respect the particular decision-making rights of indigenous peoples, and that requires respect for their ways of life, institutions, internal organisation, and the way in which each community uses, values and owns land. Therefore, the UNGC encourages businesses to take into account individual and collective rights of indigenous peoples when conducting impact assessments. According to Guiding Principle no. 17, human rights due diligence should be ongoing and it 'should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.'⁴⁹⁷

In addition, the Guiding Principles elaborate on the essential components of the due diligence: according to Guiding Principle no. 18, the due diligence process should include assessing actual and potential human rights impact; under Guiding Principle no. 19, companies are required to integrate the findings across relevant internal functions and processes, and to take appropriate action; Guiding Principle no. 20 establishes an obligation to track responses; and Guiding Principle no. 21 refers to the duty to communicate externally how impacts are addressed.

As to the timing of the due diligence process, the UNGC recommends that it is undertaken at several points in time, not just prior to commencing business operations. Due diligence efforts, adequate to assessing the impact of operations on indigenous peoples, should take place: (1) prior to initiating or investing in a business activity; (2) when there are mergers and acquisitions; (3) when entering a new country, region or location; (4) when entering into arrangements with new business partners; or (5) when the context or circumstances of the company's engagement with or impact on indigenous peoples changes (including the actual or projected closure of a business or termination of a project). Furthermore, companies should make the results of the due diligence available both to the general public and to the

⁴⁹⁷ Guiding Principles, II (B)(17).

relevant indigenous communities, in their own language and in a format that is culturally sensitive, with due respect for confidentiality.⁴⁹⁸

If a host State does not recognise a group as an indigenous people, or does not recognise indigenous peoples at all, businesses should nevertheless make an effort to identify the presence of indigenous peoples, regardless of the State's position.⁴⁹⁹ This issue is closely related to the requirement that companies pay heed to international law when undertaking due diligence efforts, and not just to domestic legislation, which may come short when it comes to protecting and promoting indigenous peoples' rights.⁵⁰⁰

c) Consultation

The UNGC requires companies to foster consultation, participation and engagement with indigenous peoples to allow businesses to learn about their specific traits and culture and to promote a genuine dialogue, as well as trusting and sustainable relationships.⁵⁰¹ Under ILO Convention No. 169, the duty to consult rests with States, as expressed in Articles 18 and 19; Although this Convention was not widely ratified,⁵⁰² several experts claim that the obligation for States to conduct prior consultations with indigenous peoples is a general principle of international law.⁵⁰³ The UNGC takes the duty to consult one step further: companies are also invited to engage in consultations.

⁴⁹⁸ UN Global Compact, 'Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples' (2013), pp. 15-16.

⁴⁹⁹ See James Anaya, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya (A/HRC/15/37) (2010), paragraphs 49-50.

⁵⁰⁰ *Idem*, paragraph 47.

⁵⁰¹ ILO, 'Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)' (2001), available at:

http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507223,en:NO, paragraph 38.

⁵⁰² To date, ILO Convention No. 169 has been ratified by 22 countries only. For information on ratification, see:

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO.

⁵⁰³ In this sense, see Permanent Forum on Indigenous Issues, Analysis of the duty of the State to protect indigenous peoples affected by transnational corporations and other business enterprises (E/C.19/2012/3) (2012), paragraphs 7-8. See also the Inter-American Court of Human Rights Judgment in the case of the *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012), paragraphs 164-166; and James Anaya, 'Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: the more fundamental issue of what rights indigenous peoples have in lands and resources', 22 *Ariz J Int'l & Comp L* 7 (2005).

Before starting the actual consultation process, companies are advised to undertake a pre-engagement analysis, through which several complications may be avoided. The goal of pre-engagement is to create a deep understanding of the indigenous peoples that might be affected, their culture, their language, their traditional decision-making process, governance and methods of communication. Companies should also investigate the relationships between and within indigenous groups, so as to identify the most adequate levels for consultation.⁵⁰⁴

The main requirement for consultation is good faith. Businesses should also carefully identify barriers that indigenous peoples might have, that are likely to prevent or disturb the effective communication of their interests to the company's representatives, such as gender or linguistic barriers. Companies are furthermore encouraged to take into account the conditions that should be fulfilled in order to guarantee the participation of women, such as the provision of childcare or eldercare. In addition, businesses should endeavour to identify the legitimate leaders of a specific indigenous group, as well as avoid the use of intermediaries as much as possible. However, consultation should be as wide as possible, in order to lower the risk that, if leadership changes, the negotiations are brought to a halt or agreements are cancelled. It should also be broad enough to include all affected groups, and the determination of the project impact area should be based not only on the direct physical impact area, but on the social, cultural and spiritual attachment to territories.

If the indigenous peoples want to involve other parties in the consultation process, including NGOs and/or independent experts, businesses should support that choice and facilitate the conditions for that involvement to occur. In addition, an effort should be made to avoid interfering in the governance of indigenous peoples, namely by avoiding politicisation, pressure or perceptions of bribery. The UNGC also highlights the fact that engagement should not end with consent; it should rather continue throughout the duration of the project and it should always be easily accessible to indigenous peoples. Finally, the initiative recommends that companies are aware and respectful of voluntary isolation, which means making first contact only when invited, creating 'buffer zones' to protect these groups, including the use of airplanes and

⁵⁰⁴ UN Global Compact, 'Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples' (2013), p. 21.

helicopters, and avoiding any potential land, air, water or noise pollution which may negatively affect their environment.⁵⁰⁵

d) Free, prior and informed consent

The mechanism of FPIC for the use of indigenous peoples' lands, resources, traditional knowledge, or intellectual property, is put forth by the UNGC as the main solution to the dangers arising from the interaction between businesses and indigenous peoples. However, it is also acknowledged that 'obtaining FPIC in a "check-the-box" manner is not sufficient to ensure that the company respects the rights of indigenous peoples. This is because FPIC is not an end in of itself, but rather a process that in turn protects a broad spectrum of internationally recognized human rights.'⁵⁰⁶

Although the mechanism of FPIC is gaining popularity in international law, national regulation is clearly lagging behind. The relevance of FPIC in international law is not only reflected in the UNDRIP, but also in the practice of UN Treaty Bodies and regional human rights bodies. There are also several international standards that require FPIC, such as the International Finance Corporation (IFC) Performance Standard 7,⁵⁰⁷ loan policies of the European Bank for Reconstruction and Development⁵⁰⁸ and the Inter-American Development Bank (IADB),⁵⁰⁹ the 2013 Equator Principles,⁵¹⁰ MSI codes of conduct such as the Roundtable on Sustainable Palm Oil⁵¹¹ and Forest Stewardship Council,⁵¹² among others.⁵¹³ Once again, as with

⁵⁰⁵ *Idem*, p. 23.

⁵⁰⁶ Amy K. Lehr (2014), p. 3.

⁵⁰⁷ See the IFC's documentation on Performance Standard 7, available at:

http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES.

⁵⁰⁸ See the European Bank for Reconstruction and Development Guidance Note on Indigenous Peoples, available at: <http://www.ebrd.com/news/publications/guides/guidance-note-on-indigenous-peoples.html>.

⁵⁰⁹ See the Inter-American Development Bank Operational Policy on Indigenous Peoples and Strategy for Indigenous Development (OP-765), available at:

<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1442299>.

⁵¹⁰ See Principle 5 of the 2013 Equator Principles (Stakeholder Engagement), referring to IFC Performance Standard 7, available at:

http://www.equator-principles.com/resources/equator_principles_III.pdf.

⁵¹¹ See the revised Free, Prior and Informed Consent Guide for RSPO Members (2015), endorsed by the RSPO Board of Governors at its meeting on 20 November 2015 in Kuala Lumpur, available at:

<http://www.rspo.org/news-and-events/announcements/free-prior-and-informed-consent-guide-for-rspo-members-2015-endorsed>.

⁵¹² See their guidelines for the implementation of the right to FPIC, Version 1 (30 October 2012), available at: <https://ic.fsc.org/en/resources/guides-and-manuals>.

⁵¹³ Some of these standards will be assessed in Chapter 5.

due diligence processes, companies should pay heed to international law, even if national law does not require FPIC. Not only does this mechanism help prevent serious human rights violations, it also mitigates legal and reputational risk for complying companies.⁵¹⁴

Accordingly, the importance of FPIC must not be underestimated. In fact, it is a well-known fact that several companies have already temporarily or permanently lost access to their projects due to the opposition of indigenous peoples. Delays in operations caused by the resistance of indigenous peoples have cost millions of dollars and, in some cases, States have revoked concessions, and companies have given up on developing projects, due to the difficulties brought about by indigenous peoples' protests. However, the opposite has also been confirmed in practice: companies that consult, negotiate and obtain consent from indigenous peoples have been able to establish mutually beneficial relationships, which facilitates operations and better protects indigenous peoples' rights.⁵¹⁵

The concepts of consultation and FPIC are distinct but intimately related. James Anaya emphatically describes both these processes as fundamental in the protection of indigenous peoples' rights, stating that '(...) neither consultation nor consent is an end in itself, nor are consultation and consent stand-alone rights. (...) [P]rinciples of consultation and consent together constitute a special standard that safeguards and functions as a means for the exercise of indigenous peoples' substantive rights.'⁵¹⁶

According to the UNDRIP, FPIC is required in the following situations: (1) removal and relocation of indigenous peoples (Article 10); (2) taking of cultural, intellectual, religious and spiritual property (Article 11); (3) adoption and implementation of legislative or administrative measures that may affect indigenous peoples (Article 19); (4) confiscation, taking, occupation, use or damage of indigenous people' lands or territories (Article 28); (5) storage or disposal of hazardous materials on indigenous peoples' lands or territories (Article 29); and (6) projects affecting indigenous peoples' lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources (Article 32).

⁵¹⁴ Amy K. Lehr (2014), p. 5.

⁵¹⁵ *Idem*, p. 7.

⁵¹⁶ James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya (A/HRC/21/47) (2012), paragraph 49.

FPIC should be an on-going process, and requires regular and constant communication with indigenous peoples, especially whenever there are changes to the project.⁵¹⁷ In order to obtain FPIC, companies have to follow a process that is negotiated with the relevant indigenous peoples. This negotiation should include the establishment of when consent will be obtained and it has to be formally documented – the latter being a requirement that also applies to the outcome of the negotiation process. In case the indigenous peoples are mostly illiterate, video recordings are strongly advised.⁵¹⁸ In addition, the UNGC advises companies to adopt a number of measures destined to facilitate the FPIC process, such as ‘engaging an independent and culturally-sensitive facilitator, chosen by or acceptable to the indigenous peoples concerned, to assist with negotiations’; providing support (financial, logistical, etc.) to the indigenous peoples, thus promoting capacity-building and the improvement of their decision-making capabilities; and engaging with independent experts to monitor the FPIC process.⁵¹⁹

Similarly to what happens with consultation, FPIC should be carefully sought so as to avoid creating or exacerbating tensions between and within indigenous groups. This is particularly important when it comes to the identification of and engagement with the legitimate traditional leaders and decision-makers.⁵²⁰

The notion of ‘free’ consent implies that indigenous peoples should have the ability to fully reject the implementation of a project. If a company fails to obtain consent, this is a solid indicator that it is lacking a ‘social license to operate’. In that case, persisting in the implementation of the project may not only lead to adverse media coverage but also to operational difficulties and shutdowns.⁵²¹

e) Remedies for adverse impacts and effective grievance mechanisms

The duty to protect against business-related human rights abuse lies primarily with the State, who has the obligation to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, the conditions for effective

⁵¹⁷ UN Global Compact, ‘Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples’ (2013), p. 26.

⁵¹⁸ Amy K. Lehr (2014), p. 18.

⁵¹⁹ UN Global Compact, ‘Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples’ (2013), p. 28.

⁵²⁰ In this sense, see Amy K. Lehr (2014), p. 10.

⁵²¹ *Idem*, p. 9.

remedy.⁵²² However, non-State based mechanisms to remedy adverse impacts are also encouraged, and range from regional or international human rights bodies to 'those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.'⁵²³

According to Guiding Principle No. 22, '[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes'. The Commentary to this Guiding Principle adds that '[w]here adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.' Guiding Principle No. 24 adds that '[w]here it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable'. Finally, Guiding Principle No. 29 determines that '[t]o make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted'.

The importance of establishing appropriate and effective grievance mechanisms must not be undervalued. When in place, effective grievance mechanisms allow for problems to be identified and addressed before they escalate, and they also contribute to the development of a positive and mutually beneficial relationship between indigenous peoples and business. Some companies have started to develop jointly-run grievance mechanisms, through which both the company and the indigenous peoples are able to nominate members for a panel that deals with grievances. This strategy is recommended by the UNGC, due to the benefits that this type of cooperation can bring: not only is it an excellent opportunity for joint problem-

⁵²² See Guiding Principles, III (A)(25).

⁵²³ *Idem*, III (B)(28), Commentary.

solving, but it also renders the grievance mechanisms more credible for the parties involved and for the public in general.⁵²⁴

A grievance mechanism is ‘any routinized, State-based or non-State-based, judicial or non-judicial process through which grievance concerning business-related human rights abuse can be raised and remedy can be sought’.⁵²⁵ It allows indigenous peoples to report perceived abuses committed by employees, third parties working on behalf of the business, or the business itself.⁵²⁶

The Commentary to Guiding Principle No. 31 very significantly starts by affirming that ‘[a] grievance mechanism can only serve its purpose if the people it is intended to serve *know about it, trust it and are able to use it*’.⁵²⁷ This Guiding Principle establishes several effectiveness criteria for non-judicial grievance mechanisms – accordingly, in order to be deemed effective, grievance mechanisms should be: (1) legitimate; (2) accessible; (3) predictable; (4) equitable; (5) transparent; (6) rights-compatible; and (7) a source of continuous learning. In addition, operational-level grievance mechanisms should be based on engagement and dialogue.

The legitimacy requirement is complex and encompasses, first and foremost, the recognition of indigenous peoples’ status as having the right to full enjoyment of their individual and collective rights. Second, grievance mechanisms should acknowledge and respect the role of the customary laws, traditions and practices of indigenous peoples and the authority of their governance institutions. This includes recognising that indigenous peoples may have internal grievance mechanisms that address violations within their traditional jurisdiction. However, these traditional mechanisms should always be rights-compatible, both in process and in outcome. Also very importantly, the accessibility requirement includes physical, linguistic, cultural and gender accessibility (therefore, including both men and women, elders, youth and other potentially vulnerable groups).⁵²⁸

Regarding the content of remedies, the UN Working Group on Business and Human Rights notes the lack of elaboration within the Guiding Principles, and points to

⁵²⁴ Amy K. Lehr (2014), p. 19.

⁵²⁵ UN Global Compact, ‘Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples’ (2013), p. 30.

⁵²⁶ *Idem*, p. 32.

⁵²⁷ Guiding Principles, III (B)(31), Commentary (emphasis added).

⁵²⁸ UN, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/68/279) (7 August 2013), paragraphs 51-52.

Articles 11 and 28 of the UNDRIP.⁵²⁹ The first establishes indigenous peoples' right to effective redress (which may include restitution) with respect to their cultural, intellectual, religious and spiritual property taken without their FPIC or in violation of their laws, traditions and customs. Article 28 provides an example of what would constitute a rights-compatible outcome, namely restitution or, if that is not possible, just fair and equitable compensation.

Whatever form grievance mechanisms ultimately take, they should entail both the consent and the participation of indigenous peoples.⁵³⁰ Lastly, the UNGC encourages companies to formalise and document grievance mechanisms, as well as to monitor (either internally or externally) and assign accountability for them.⁵³¹

2.5. The UN Global Compact and the cultural rights of indigenous peoples

The UNGC addresses the specific issue of indigenous peoples' cultural rights, again through its business reference guide to the UNDRIP.⁵³² The most relevant provisions of the UNDRIP for this research are those that relate to culture, namely Articles 8, 11, 12, 13 and 15. Article 8 refers to the right not to be subjected to forced assimilation or destruction of their culture. Article 11 contains the right of indigenous peoples to practise and revitalise their cultural traditions and customs. Article 12 states that indigenous peoples are entitled to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies, including access, use and control of religious and cultural sites and objects, as well as the repatriation of human remains. Article 13 sets out indigenous peoples' right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. Finally, Article 15 refers to indigenous peoples' right to the dignity and diversity of their cultures, traditions, histories and aspirations, appropriately reflected in education and public information. Whilst the UNDRIP

⁵²⁹ *Idem*, paragraph 53.

⁵³⁰ Human Rights Council, Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries (A/HRC/EMRIP/2012/CRP.1) (4 July 2012), paragraph 56.

⁵³¹ See UN Global Compact, 'Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples' (2013), p. 33.

⁵³² UN Global Compact, 'Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples' (2013), pp. 46-49.

establishes obligations regarding these rights that are only imposed on States, the UNGC encourages companies to acknowledge, respect and support them. The programme thus suggests that companies adopt a number of practical actions, destined both to respect and support the rights mentioned above.

As to how business can respect (and foster respect) for the cultural rights of indigenous peoples, the Compact starts by inviting companies to use due diligence processes so as to ensure that their projects and their business partners do not cause, contribute to or encourage the forced assimilation of indigenous peoples. In this regard, particular attention should be paid whenever projects are to be developed in areas that constitute traditional lands, where there used to be indigenous presence that no longer exists, as well as when projects require indigenous peoples to relocate. Very importantly, the UNGC also incentivises the recourse to cultural impact assessments. Moreover, businesses should establish partnerships with indigenous peoples so as to avoid harming sacred places and the observation of religious and spiritual practices, as well as to ensure that these communities are not depicted or described by the company in a derogatory or discriminatory manner, which infringes upon their right to dignity, their culture, tradition, history and aspirations. For these purposes, the UNGC suggests that companies use the Akwé: Kon Voluntary Guidelines,⁵³³ established under the Convention on Biological Diversity, which are '[v]oluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities'.

Businesses are also invited to communicate with indigenous peoples using a language and medium accessible to them. Furthermore, companies should not appropriate, commercialise or use without consent any form of cultural or religious symbols, including the names of current or deceased members of the community. This also applies to the use of photographs and video footage, both of the indigenous peoples affected by the project and their deceased ancestors. In addition, items that the indigenous peoples consider offensive should not be used by companies or their business partners. All indigenous peoples that are involved in the project, including employees, should also be given appropriate time and venues for them to practice their religious customs and traditions, both in private and public ceremonies. In

⁵³³ Available at: <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

addition, particular care should be taken whenever an indigenous person passes away on site, so as to honour their dignity and culture. Companies should also prevent the influx of outside population from disrupting the culture, language and spirituality of indigenous peoples, as well as from compromising their influence in the community. If needed, companies should establish road-less operations. Finally, in case a company caused or contributed to cultural or environmental damage, it should consult with the indigenous peoples affected, in order to remediate the adverse impacts.

Actions regarding business support for the cultural rights of indigenous peoples include conducting cultural awareness training for employees, organising respectful events that celebrate indigenous culture, supporting initiatives aimed at the preservation of indigenous cultural heritage, enabling employees to practice their religion, incorporating indigenous knowledge and learning styles to strengthen business practice, providing financial or other support to indigenous organisations involved in the preservation of traditional knowledge and cultural heritage, and, where appropriate, encouraging displays of indigenous flags and/or other cultural identifiers in the workplace.

In practice, several companies have reported their efforts towards respecting and supporting the rights of indigenous peoples, although none of them have covered all the points mentioned above. For instance, from the twenty-two companies listed in the case examples provided by the UN Global Compact Office, only twelve have focused on culture, language and spirituality, and only eleven reported action on cultural heritage and traditional knowledge, whilst in the category of identity and group membership even less (only five companies) have reported action.

Google, for example, partnered with the Surui tribe, in Brazil, in order to develop a programme documenting traditions and cultural heritage and creating a cultural map of the area, using Google Earth. In addition, Google taught the indigenous peoples how to map the Surui territory, which is extremely important, since it enables monitoring of the destruction of the rainforest, both by legal and illegal logging. Google also provided technology that allows the Surui to monitor their land's carbon stock,

which they trade on the carbon credit marketplace, thus promoting sustainable development.⁵³⁴

Microsoft, on the other hand, implemented a programme that contributes to the preservation of indigenous languages, namely through the Local Language Program, which aims at providing individuals with access to computers in their mother tongue. Within this programme, Microsoft created a Language Interface Pack for Windows in the Cherokee language.⁵³⁵

MMG Limited, a mining company, put a cultural heritage management plan in place at each of its sites, in order to ensure the protection of culturally relevant sites and items, as well as the respect for traditional knowledge. The company also supported an intangible cultural heritage survey, in partnership with academics and government representatives, at its site in Sepon, Laos, capturing oral history, songs, music and religious expressions of twenty-one indigenous communities.⁵³⁶

3. Conclusions

It is clear, at this point, that CSR and foreign investment are closely related, but maintain a relationship that is hard to grasp and balance. Some commentators point out the emergence of a 'new constitutionalism', whereby States transfer sovereign powers to international organisations and grant inviolable rights to investors, 'removing important aspects of policy from State control and diminishing its ability not only to intervene in the market but to regulate corporations'.⁵³⁷ In this relationship, foreign investors arguably enjoy a much stronger level of protection than other stakeholders do under CSR initiatives – one can quickly arrive at the conclusion that '[t]he 'soft' law of CSR is no match for the 'hard(er)' laws protecting shareholder interest'.⁵³⁸

⁵³⁴ UN Global Compact, 'Practical Supplement - Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples' (2015), available at: https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/Case_Examples.pdf. See also the very interesting video about the Surui's contact with technology provided by Google: <http://www.google.com/earth/outreach/stories/surui.html>.

⁵³⁵ *Ibidem*; see also: <http://firstpeoples.org/wp/tag/microsoft/>.

⁵³⁶ *Ibidem*; in addition, see: <http://www.mmg.com/en/Investors-and-Media/News/2012/07/10/Media-Release.aspx>.

⁵³⁷ Paddy Ireland and Renginee G. Pillay (2013), p. 78.

⁵³⁸ *Idem*, p. 79.

It is thus no wonder that so many commentators show scepticism and reluctance towards CSR. Some argue that the promise of CSR is still far from being fulfilled: where companies were supposed to bridge the gaps left by State regulation, 'major blind spots remained'.⁵³⁹ Others ask if CSR is merely a contemporary version of the old French aristocratic idea of '*noblesse oblige*' for multinational corporate elites – a concept that expressed the obligation of aristocracies to fulfil certain social roles as a result of the privileged position they had in society.⁵⁴⁰ It is also common to find expressions of discontent regarding the shape that CSR has taken in many cases, with authors claiming that 'the managerialization and commodification of CSR'⁵⁴¹ is a mostly negative tendency.

Nevertheless, there is much to be gained from the cooperation between governments, businesses, NGOs and stakeholders in general. Empirical and conceptual studies alike have demonstrated that corporate conduct codes are not a panacea, but have the potential to improve the behaviour of companies, whatever their nature and size. It appears clear that the voluntary nature of CSR cannot guarantee that all companies will improve their governance practices as a result of the adoption of corporate conduct codes – as opposed to what happens under hard law requirements. It is also evident from empirical studies that companies tend to comply with voluntary conduct codes more in form than in substance, thus limiting the reach of CSR. As Cuomo et al. affirm, 'codes can help avoid, or significantly reduce, the use of bad governance practices, but they are unable to promote the universal adoption of best governance practices'.⁵⁴² It is, therefore, important to consider whether CSR is, or is not, worth pursuing, but it appears that there is still no consensus on this point – it is considered to be 'too early' to judge both the hard law and soft law approaches in this regard, even though the tendency is to consider these two variants as complementary, rather than alternatives.⁵⁴³

In this regard, it is important to note the increasingly relevant role of NGOs. As Jacob rightly observes,

⁵³⁹ Peter Utting and José Carlos Marques (2013), p. 2.

⁵⁴⁰ In this sense, see Colin Crouch, 'CSR and Changing Modes of Governance: Towards Corporate 'Noblesse Oblige'?' in Peter Utting and José Carlos Marques (eds), *Corporate Social Responsibility and Regulatory Governance - Towards Inclusive Development?* (Palgrave Macmillan 2013), p. 39.

⁵⁴¹ Ngai-Ling Sum, 'Wal-Martization and CSR-ization in Developing Countries' in Peter Utting and José Carlos Marques (eds), *Corporate Social Responsibility and Regulatory Governance - Towards Inclusive Development?* (Palgrave Macmillan 2013), pp. 63-64.

⁵⁴² Francesca Cuomo et al. (2015), p. 3.

⁵⁴³ *Ibidem*.

*International organisations and NGOs are critical catalysts in pushing for further developments. They fill a vital gap in what is otherwise a largely self-serving clientele by pointing to concerns that do not traditionally interest the principal actors (i.e. investors and states), such as transparency, accountability, legitimacy, and non-investment obligations.*⁵⁴⁴

Not only do NGOs offer a more unbiased perspective over issues that might not be in the States' and investors' interests, they also provide valuable information, documentation and – more importantly within the context of the present study – they can represent local interests in investment arbitration, as *amicus curiae*, a mechanism that will be clarified in Chapter 6. They also monitor the activities of MNEs, publicise them through increasingly fast and effective communications around the globe and take action, usually through different forms of activism (protests, petitions, boycotts, etc.).⁵⁴⁵ NGOs are thus more and more important at the international and national levels, contributing to a growing global awareness of human rights (and, particularly, cultural rights) issues.

Initiatives such as the UNGC constitute positive developments, even though their effectiveness is questioned. However, it is worth noting that many of the actions that businesses are invited to undertake under the UNGC, as analysed above, may provide an important basis for the development of hard law standards in this regard. The initiative already provides detailed guidelines on how to ensure the protection and promotion of cultural rights, namely regarding indigenous peoples – it is up to the international community to build on this work in order to achieve more effective results.

To end this chapter, it is imperative that I answer a fundamental question: is CSR enough to ensure respect for culture? The answer is necessarily negative, but must be nuanced. It appears clear that CSR is not enough to guarantee that companies will behave in a way that is compatible with cultural rights – especially given the fact that the CSR agenda has focused less on human rights than on other issues such as climate change, and that cultural rights are a problematic category of human rights, as explained in the first chapter of this research. It is also clear that socially responsible corporate conduct is not a panacea, and that hard law mechanisms (such

⁵⁴⁴ Marc Jacob (2010), p. 43.

⁵⁴⁵ In this sense, see David Kinley and Junko Tadaki, 'From talk to walk: The emergence of human rights responsibilities for corporations at international law', 44 Virginia Journal of International Law 931 (2004), p. 934.

as national legislation and, perhaps in the future, international law) must accompany the developments achieved by CSR in complementarity. Nonetheless, there are serious benefits to a CSR approach that should not be ignored, and there is evidence of at least partial success to several initiatives, such as the UNGC. In conclusion, no – CSR is not enough. But it is an incredibly important part of the solution.

Chapter 5 – Financial institutions and cultural rights

The goal of this research is to identify and assess hard and soft law mechanisms that can provide balanced solutions for the protection of cultural rights in the context of foreign investment. Investment usually involves a number of actors that are capable of influencing the outcomes of projects and their impacts on stakeholders: I refer specifically to MNEs (whose role vis-à-vis human rights was explored in the last chapter), home and host countries (who have the primary duty to protect and promote human rights, but whose role is outside the scope of this research), and financial institutions (who might have the power to influence the conduct of foreign investors).

This chapter will attempt to establish when and how banks have the possibility (or even obligation) of demanding that the investors they finance respect human rights and, more specifically, cultural rights. At stake here, much like in the previous chapter, is the issue of influencing the behaviour of MNEs so as to guarantee that they will do everything in their power to respect, protect and promote cultural rights. In addition, this chapter will endeavour to detect the main weaknesses of current mechanisms, thus identifying the areas in which there is room for improvement. In short, I intend to assess how banks can make a difference in the way culture is respected within the context of foreign investment.

The first section of this chapter will focus on the general human rights responsibilities of financial institutions, briefly characterising the hard and soft law instruments applicable to banking and human rights. The second section will refer to Multilateral Development Banks (MDBs), with particular emphasis on the IFC, the private sector arm of the World Bank Group, which provides financial services to private investors in developing countries, aimed at development goals. The third section will explore the relationship between commercial banks and human rights, starting from the idea that loan requirements constitute a powerful instrument for the development of a more socially responsible investment climate, with significant consequences for cultural rights in general, and for the cultural rights of indigenous peoples in particular. Finally, some conclusions will be drawn.

1. Introduction: Financial Institutions and Human Rights

Financial institutions have grown in both size and complexity over the last few decades, to the point where some large multinational banks have balance sheets that are bigger than some countries' Gross Domestic Product.⁵⁴⁶ They can have a powerful effect on the human rights of stakeholders in the context of foreign investment: banks provide funding for projects that may have very positive outcomes, such as economic growth, eradication of poverty and development, but they also have the potential to cause devastating effects on the lives of local communities, namely through environmental damage and the violation of human rights. In fact, banks are uniquely positioned to influence investment projects, with the possibility of incorporating specific human rights requirements into loan agreements. By interacting with their clients, banks thus have the ability to shape foreign investment, mitigating social and environmental impacts – or aggravating them.

Much like other businesses, banks have increasingly become the target of social expectations regarding human rights, largely driven by mounting pressure from NGOs and civil society organisations.⁵⁴⁷ Traditionally, banks had to assess and deal with risks that they themselves incurred – whether legal, reputational or other – as a consequence of their operations; more recently, though, the focus shifted amidst the international community so as to emphasise the risk to other stakeholders. The societal expectations over the conduct of banks have become impossible to ignore, but there is still significant uncertainty regarding their role in the protection and promotion of human rights.

There are essentially two types of financial institutions for the purposes of this chapter: those in the public sector, i.e. MDBs; and those in the private sector, i.e., commercial banks. Whilst the first are international organisations, the second are private corporations; both have been the subject of much debate, with different implications. As international organisations, MDBs are subject to international law and controlled by States. Commercial banks, on the other hand, are subject to both domestic and international law and fall within the category of 'businesses'.

⁵⁴⁶ Mary Dowell-Jones, '*Financial Institutions and Human Rights*', 13 Human Rights Law Review 423 (2013), p. 431.

⁵⁴⁷ Malcolm Forster et al., '*The Equator Principles - Towards Sustainable Banking*', 6 Journal of International Banking and Finance Law 216 (2005)

There are several soft law instruments dedicated to the protection of human rights that have (or should have) a strong influence over financial institutions, and this section will place particular emphasis on inter-governmental initiatives. The first one that needs to be mentioned is, of course, the UN Guiding Principles, already referred in the previous Chapter. In addition, it is also important to mention the OECD Guidelines for Multinational Enterprises, as well as other initiatives originating from the OECD and the UN. Standards established by MDBs will be covered in Section 2, whereas private sector initiatives, namely the Equator Principles (EP) and the Thun Group of Banks, will be assessed in Section 3.

1.1. The UN Guiding Principles

As mentioned in the previous chapter, the Guiding Principles are based on three essential pillars: (1) the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; (2) the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and (3) greater access by victims to effective remedy, both judicial and non-judicial.⁵⁴⁸ This research focuses on the second and third pillars.

It is crucial to understand how the Guiding Principles apply to the financial sector, with its particularities. The complexity and vast diversity of today's financial services constitute the biggest obstacle to an effective engagement with human rights, coupled with a surprising lack of interaction between human rights NGOs and activists, on the one hand, and banks, on the other.⁵⁴⁹

Therefore, this Section will attempt to clarify if and how the Guiding Principles affect the activities of banks. First of all, the Guiding Principles apply to all businesses, 'regardless of their size, sector, operational context, ownership and structure'⁵⁵⁰, which includes banks. Because the Guiding Principles are meant to apply universally, and not just to the financial sector, they only provide general guidance, rather than establishing detailed instructions as to how each bank should proceed. This reinforces the importance of initiatives that contextualise and develop the

⁵⁴⁸ UN, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (7 April 2008), paragraph 9.

⁵⁴⁹ Mary Dowell-Jones (2013), p. 428.

⁵⁵⁰ Guiding Principles, Principle 14.

methodologies that are relevant to certain types of banks, within the framework of the Guiding Principles.

Banks (like other companies) are required to respect human rights (as opposed to States, who not only have the responsibility to respect, but also to protect and fulfil), which means they should ‘avoid infringing on the human rights of others and (...) address adverse human rights impacts with which they are involved.’⁵⁵¹ This obligation includes prevention, mitigation and remediation of adverse human rights impacts caused by businesses.⁵⁵² Principle 13 further states that the responsibility to protect entails an obligation to ‘[a]void causing or contributing to adverse human rights impacts *through their own activities*, and address such impacts when they occur; [and] [s]eek to prevent or mitigate adverse human rights impacts that are *directly linked* to their operations, products or services by their business relationships, even if they have not contributed to those impacts.’⁵⁵³ This applies both to companies’ actions and omissions.⁵⁵⁴

Banks (like all other businesses) consequently have the obligation, under the Guiding Principles, to respond adequately to situations where (1) their activity *causes* an adverse impact on human rights; (2) their activity *contributes to* adverse impacts; or (3) their operations, products or services are *directly linked* to adverse human rights impacts through business relationships. The nature of a bank’s involvement with human rights impacts can thus manifest in several different forms, and banks should identify which modality of involvement each specific situation represents so as to define an appropriate course of action.

The most common human rights impacts included in the first category relate to the bank’s relationship with its employees (e.g., unequal pay for men and women, discrimination of certain employees based on race or ethnicity), and thus fall outside the scope of this research. The second category refers to situations where the bank contributes, or is perceived as contributing, to human rights violations. The notion of ‘contribution’ used in the Guiding Principles is close to that of ‘complicity’, which has legal and non-legal meanings and implications, as the commentary to Principle 17 elucidates. The legal standard of complicity is related to both criminal and civil liability at the domestic level, and is understood in international criminal law as ‘aiding and

⁵⁵¹ *Idem*, Principle 11.

⁵⁵² *Idem*, Commentary to Principle 11.

⁵⁵³ *Idem*, Principle 13 (emphasis added).

⁵⁵⁴ *Idem*, Commentary to Principle 13.

abetting', i.e. 'knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.'⁵⁵⁵ The third category consists of situations where there are adverse human rights impacts, which are directly linked to the bank's operations, services or products, *and* where the bank is connected to the entity causing those impacts through its business relationships. In the case of banks, 'business relationships' include 'relationships with borrowers, project partners, retail and commercial banking clients, and other entities, potentially including some more distant in the value chain'.⁵⁵⁶ Direct linkage should be assessed on a case-by-case basis in order to establish the degree of proximity, which can range from 'clear association' to 'extremely remote'.⁵⁵⁷

The most usual contentions raised against banks, based on human rights impacts, result from this third type of involvement, i.e., from situations where the bank is not directly causing or contributing to human rights violations, but rather from situations where the bank's operations, products or services are *directly linked* to a human rights impact through its business relationships.⁵⁵⁸

In addition, according to Guiding Principle 15, in order to comply with their responsibility to protect human rights, banks (and all businesses) should have a number of strategies in place: (1) developing a policy commitment to meet their responsibility to respect human rights; (2) conducting human rights due diligence, so as to identify, prevent, mitigate and account for how they address their impacts on human rights; and, finally, (3) creating processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.⁵⁵⁹ Companies

⁵⁵⁵ *Idem*, Commentary to Principle 17. See also OHCHR, 'The Corporate Responsibility to Respect Human Rights - An Interpretive Guide' (2012), available at: http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, pp. 79-80. The matter of corporate complicity is extremely interesting but, for reasons of space, will not be developed in this research. For further information on the subject, see Anita Ramasastry, '*Secrets and Lies - Swiss Banks and International Human Rights*', 31 Vand J Transnat'l L 325 (1998); Anita Ramasastry, '*Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*', 20 Berkeley J Int'l L 91 (2002); Florian Wettstein, '*The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*', 96 Journal of Business Ethics 33 (2010); and Andrew Clapham and Scott Jerbi, '*Categories of corporate complicity in human rights abuses*', 24 Hastings Int'l & Comp L Rev 339 (2000).

⁵⁵⁶ UNEP Finance Initiative and Foley Hoag LLP, 'Banks and Human Rights - A Legal Analysis' (December 2015), available at: <http://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf>, p.10.

⁵⁵⁷ *Idem*, p. 15.

⁵⁵⁸ *Idem*, p. 13.

⁵⁵⁹ Guiding Principles, Principle 15.

are thus expected to ‘know and show’ that they respect human rights in the course of their activities.⁵⁶⁰

The requirement of due diligence is perhaps the most significant, placed at the heart of the Guiding Principles. Some authors even affirm that they ‘provide[] a stronger legal mandate than has existed in the past in terms of considering of social issues, now under the guise of human rights’, thus turning stakeholders into ‘rights-holders with legitimate interests that need to be respected.’⁵⁶¹

Whereas most banks already have in place risk management mechanisms, such as non-discrimination and environmental impact assessment processes, designed to prevent risks for the banks themselves, the Guiding Principles require them to set in place a specific human rights impact assessment. This requirement means that banks ‘should put risks to *rights-holders* first, rather than risks to the business itself’.⁵⁶² The approach taken by the Guiding Principles regarding due diligence processes has been analysed in considerable detail in the previous Chapter; therefore, at this point, I will endeavour to focus only on the specificities of the requirements as they relate to the financial sector.

According to BankTrack, an NGO focused on private sector commercial banks, a large percentage of banks still does not commit to properly implementing due diligence processes: only 16 out of 45 banks assessed in 2016 fully committed to carrying out human rights due diligence processes, whilst 17 did not even mention such process at all. Furthermore, none of the assessed banks demonstrated how they guarantee meaningful consultation with potentially affected groups.⁵⁶³ Finally, it was discovered that only 9 out of the 45 banks specifically allocated responsibility⁵⁶⁴ for addressing human rights within the company to clearly identified levels and functions.⁵⁶⁵

⁵⁶⁰ Commentary to Principle 15; see also OHCHR, ‘Letter from OHCHR to the Organization for Economic Cooperation and Development (‘OECD’)’ (27 November 2013), available at: <http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf>, paragraph 7.

⁵⁶¹ Deanna Kemp and Frank Vanclay, ‘Human rights and impact assessment: clarifying the connections in practice’, 31 Impact Assessment and Project Appraisal 86 (2013), p. 90.

⁵⁶² BankTrack, ‘Banking with Principles? Benchmarking Banks against the UN Guiding Principles on Business and Human Rights’ (June 2016), available at: http://www.banktrack.org/ems_files/download/5412388/banking_with_principles_june2016update.pdf, p. 8 (emphasis in the original).

⁵⁶³ See Guiding Principle 18.

⁵⁶⁴ See Guiding Principle 19.

⁵⁶⁵ BankTrack (June 2016), pp. 8-9.

It appears clear that, for banks, who engage with multiple kinds of frontline businesses through multiple different activities and operations, it can be extremely difficult – if not impossible – to assess the risks involved in each of those business relationships. In that regard, the commentary to Principle 17 meaningfully suggests that ‘business enterprises should identify general areas where the risk of adverse human rights impacts is most significant’ and ‘prioritize these for human rights due diligence.’

Therefore, in order to conduct an initial scoping, banks should identify entities in their value chain that belong to high-risk sectors; they should pinpoint their clients’ products or services that present the highest risk in terms of human rights impacts; and, finally, they should determine which contexts are high-risk (such as, for example, countries where there is a high level of corruption or locations where indigenous peoples inhabit or use the land for their livelihood and cultural expression). This scoping exercise should be undertaken with recourse to ‘widely available and credible sources focused on thematic or country-related human rights challenges and, in some cases, those relevant to business and even particular sectors.’⁵⁶⁶

Once scoping is concluded, banks still need to prioritise action to address the risks that were identified. In order to do so, they need to take into account the severity of their risk of human rights impacts, which ‘will be judged by their scale, scope and irremediable character’.⁵⁶⁷ Scale refers to the gravity of the human rights impact whilst scope refers to the number of individuals potentially or actually affected. An impact will be deemed irremediable if there are limits to how the position of those affected can be restored to what it was before the impact, at least in an equivalent manner. Classifying a situation as ‘severe’ does not, however, require the satisfaction of all three requirements mentioned above, although it appears clear that, the greater the scale and/or scope of an impact, the less it is likely to be remediable.⁵⁶⁸ A company’s response to the risk of a potential or actual human rights impact should be proportionate to severity, and priority should be given to those risks that are more severe.

As soon as the risks of human rights impacts are identified and prioritised, banks should react accordingly. If the impacts fall into the first category (i.e., the bank is directly causing a human rights impact), banks are supposed to either *cease* or

⁵⁶⁶ UNEP Finance Initiative and Foley Hoag LLP (December 2015), p. 12.

⁵⁶⁷ Commentary to Guiding Principle 14.

⁵⁶⁸ In this sense, see OHCHR, ‘The Corporate Responsibility to Respect Human Rights - An Interpretive Guide’ (2012), questions 12 and 13, p. 19.

prevent the activities that cause or are likely to cause human rights impacts. Similarly, if they fall into the second category (i.e., the bank contributes to a human rights impact), the bank should ‘take the necessary steps to *cease or prevent* its contribution and use its *leverage* to mitigate any remaining impact to the greatest extent possible’.⁵⁶⁹ If the impacts fall into the third category (i.e., the bank is directly related through its business relationships to adverse human rights impacts, but does not directly cause or contribute to the human rights impact), there is still a responsibility to prevent or mitigate that impact. These situations are understandably much more convoluted than the first two, and it is crucial to understand how different levels of leverage can affect the bank’s duties. Accordingly, the Guiding Principles suggest that appropriate action will depend on ‘the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.’⁵⁷⁰

Companies are considered to have leverage when they are able to affect the activities of the entity that is causing the human rights impact. If such leverage exists, companies should exercise it in order to prevent or mitigate the adverse impact. If, however, leverage is lacking, companies should make an effort to increase it, so as to be able to influence the actions of the entity that is causing (or likely to cause) the adverse impact. If increasing leverage is impossible, companies should consider ending the business relationship.⁵⁷¹

The amount of leverage that each individual bank possesses can vary considerably depending on which types of product, service or operation are at stake.⁵⁷² One typical example of this variation is project finance, which is:

(...) a method of financing in which the lender looks primarily to the revenues generated by a single Project, both as the source of repayment and as security for the exposure. (...) In such transactions, the lender is usually paid solely or almost exclusively out of the money generated by the contracts for the Project’s output, such as the electricity sold by a power plant. The client is

⁵⁶⁹ Commentary to Guiding Principle 19 (emphasis added).

⁵⁷⁰ *Idem*.

⁵⁷¹ *Idem*.

⁵⁷² UNEP Finance Initiative and Foley Hoag LLP (December 2015), p. 17.

*usually a Special Purpose Entity that is not permitted to perform any function other than developing, owning, and operating the installation.*⁵⁷³

In project finance,⁵⁷⁴ lenders typically have more influence over the construction and operation of the project, but this leverage is particularly strong before the project starts⁵⁷⁵ and dissolves as soon as the loan is repaid.⁵⁷⁶ Very differently, general corporate loans that are not specific to a project entail much less leverage, even though banks have the possibility of increasing it through contractual language and other alternatives, such as threatening to withdraw funding.⁵⁷⁷

Finally, Principle 22 establishes an obligation for businesses to provide for or cooperate in the remediation of human rights impacts that they have caused or contributed to.⁵⁷⁸ This principle applies to banks in the same manner as it applies to other businesses, and will not therefore be explored further in this chapter.

1.2. The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (hereinafter, the 'Guidelines') were first adopted in 1976 and revised five times, the latest revision having taken place in 2011. At the time of writing, they count with the adherence of 46 countries, including several non-OECD countries; the EU has the status of observer.⁵⁷⁹ The Guidelines are a soft law instrument dedicated to the relationship between companies and their adverse impacts on individuals, communities and the environment, including human rights. The 2011 review was undertaken with a view to reflecting crucial structural changes in international business, with the participation of companies, labour, NGOs, non-adhering countries and international organisations. By recommending due diligence efforts in global supply chains, the Guidelines 'became the first international corporate responsibility instrument to incorporate risk-based due

⁵⁷³ Equator Principles, 'The Equator Principles III' (June 2013), available at: http://www.equator-principles.com/resources/equator_principles_III.pdf, p. 18.

⁵⁷⁴ For a very interesting and detailed analysis of the relationship between project finance, human rights and development, see Sheldon Leader and David Ong, *Global project finance, human rights and sustainable development* (Cambridge University Press 2011).

⁵⁷⁵ UNEP Finance Initiative and Foley Hoag LLP (December 2015), p. 17.

⁵⁷⁶ Kendyl Salcito et al., 'Assessing corporate project impacts in changeable contexts: a human rights perspective', 47 *Environmental Impact Assessment Review* 36 (2014), p. 37.

⁵⁷⁷ UNEP Finance Initiative and Foley Hoag LLP (December 2015), p. 17.

⁵⁷⁸ See also Commentary to Guiding Principle 22.

⁵⁷⁹ Business and Industry Advisory Committee to the OECD, 'Responsible Business Conduct: the OECD Guidelines for Multinational Enterprises' (June 2015), available at: <http://biac.org/wp-content/uploads/2015/06/FIN-15-06-GUIDELINES-BROCHURE.pdf>, p. 7.

diligence into major areas of business responsibility, including human rights, environmental and labour issues and anti-corruption.⁵⁸⁰

The Guidelines are government-backed recommendations directly addressed to MNEs operating in and from adhering countries, and ‘have received widespread support from all stakeholders, including the business sector.’⁵⁸¹ Not only are they one of the oldest standards addressing CSR, but they are also ‘the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.’⁵⁸² According to the Preface,

*The Guidelines aim to ensure that the operations of (...) enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.*⁵⁸³

The Guidelines cover a wide range of issues, but, for the purposes of this research, I will focus on the human rights chapter, which was added in the 2011 revision and constitutes a very welcome development, as the previous versions only briefly referred to the UDHR in the preamble. In fact, since 2011, the Guiding Principles have been incorporated into the Guidelines, and terminological convergence between the two initiatives was intentionally achieved.⁵⁸⁴ The General Policies of the Guidelines start by stating that companies should ‘[r]espect the internationally recognised human rights of those affected by their activities.’⁵⁸⁵ Chapter IV of the Guidelines is dedicated to human rights and it affirms that enterprises should: (1) respect human rights; (2) avoid causing or contributing to adverse human rights impacts; (3) find ways of preventing or mitigating adverse impacts that are directly linked to their operations, products or services, even if they did not contribute to those impacts; (4) have a policy

⁵⁸⁰ Adrian Blundell-Wignall, ‘The MNE Guidelines at 40: Implementation still matters’ (2016), available at: <https://mneguidelines.oecd.org/mne-guidelines-at-40-implementation-still-matters.htm>.

⁵⁸¹ UNEP Finance Initiative and Foley Hoag LLP (December 2015), p. 42.

⁵⁸² *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011), available at: <http://dx.doi.org/10.1787/9789264115415-en>, ‘Foreword’, p. 3.

⁵⁸³ *Idem*, ‘Preface’, p. 13.

⁵⁸⁴ See OECD Global Forum on Responsible Business Conduct, ‘Note by the Chair of the Negotiations on the 2011 Revision of the Guidelines, Regarding the Terminology on “Directly Linked” in Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector (June 2014), available at: <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-3.pdf>, p. 1.

⁵⁸⁵ *OECD Guidelines for Multinational Enterprises* (2011), paragraph A.2, p. 19.

commitment to respect human rights; (5) carry out human rights due diligence; and (6) provide for or co-operate in the remediation of adverse human rights impacts.⁵⁸⁶

Similarly to what happens with the Guiding Principles, the Guidelines establish a responsibility to respect human rights that is independent from States' compliance with internationally recognised HRL.⁵⁸⁷ Businesses should pay heed, at a minimum, to the International Bill of Rights.⁵⁸⁸ In addition, whenever necessary, they should consider and apply other specific standards, depending on whether their activities interfere with groups that require particular attention, such as: indigenous peoples; ethnic or national, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families. In situations where companies operate in conflict zones, they are expected to consider and apply principles of international humanitarian law, 'which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments'.⁵⁸⁹

The first paragraph of Chapter IV emphasises companies' responsibility to respect human rights and address actual or potential human rights impacts, which means that they should 'tak[e] adequate measures for their identification, prevention, where possible, and mitigation of potential human rights impacts, remediation of actual impacts, and accounting for how the adverse human rights impacts are addressed'.⁵⁹⁰

In line with the Guiding Principles, the Guidelines establish three different kinds of situations of human rights impacts: (1) when a company *causes* (through actions or omissions) an adverse impact, it should endeavour to stop or prevent it; (2) when a company substantially *contributes* to an adverse impact, it should stop or prevent its contribution and, if possible, use its leverage to reduce human rights impacts caused by others; and (3) when a human rights impact is *directly linked* to a company's operations, products or services, through its *business relationships* with other entities (including 'business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services'),⁵⁹¹ it should use its leverage, alone or in cooperation with other entities, to influence the

⁵⁸⁶ *Idem*, Chapter IV, p. 31.

⁵⁸⁷ *Idem*, paragraph 38, p. 32.

⁵⁸⁸ *Idem*, paragraph 29, p. 32. The International Bill of Rights comprises the UDHR, the ICCPR and the ICESCR, as well as the principles concerning fundamental rights set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

⁵⁸⁹ *Idem*, paragraph 40, p. 32.

⁵⁹⁰ *Idem*, paragraph 41, p. 33.

⁵⁹¹ *Idem*, paragraph 14 of the Commentary to Chapter II – General Policies, p. 23.

harmful behaviour and prevent or mitigate the adverse impact.⁵⁹² In addition, companies should encourage their business partners to apply standards of corporate conduct that are aligned with the Guidelines.⁵⁹³

The third modality referred above (impacts that are directly linked to a company's operations, products and services, through its business relationships) constitutes a significant expansion of the scope of the Guidelines, aligned with the Guiding Principles. In fact, before the 2011 revision, an 'investment nexus' was required, in order for a human rights impact in a company's value chain to be considered a responsibility of that company. What 'investment nexus' meant was defined by the OECD Committee on International Investment and Multinational Enterprises in basic terms, stating that companies needed to have an 'investment like relationship' through which it could influence the entity causing the human rights impact.⁵⁹⁴ The elimination of this requirement constituted a very welcome development.

Paragraph 4 focuses on policy commitments, and the commentary elaborates on the subject, stating that companies should adopt a policy that '(i) is approved at the most senior level of the enterprise; (ii) is informed by relevant internal and/or external expertise; (iii) stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (iv) is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; (v) is reflected in operational policies and procedures necessary to embed it throughout the enterprise.'⁵⁹⁵

As to the responsibility to conduct human rights due diligence, paragraph 5 of Chapter IV states that the process 'entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed.'⁵⁹⁶ Human rights due diligence processes are expected to be on-going, so as to take into account changes in circumstances (either in terms of the company's operations or in terms of context) and they are expected to adequately 'identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business

⁵⁹² *Idem*, paragraphs 42-43, p. 33.

⁵⁹³ *Idem*, paragraph A.14 of Chapter II – General Policies, p. 19. See also Business and Industry Advisory Committee to the OECD (June 2015), p. 8.

⁵⁹⁴ UNEP Finance Initiative and Foley Hoag LLP (December 2015), pp. 42-43.

⁵⁹⁵ *OECD Guidelines for Multinational Enterprises* (2011), paragraph 44, pp. 33-34.

⁵⁹⁶ *Idem*, paragraph 45, p. 34.

decision-making and risk management systems.⁵⁹⁷ The Guidelines further differentiate between actual and potential human rights impacts, establishing an obligation to remediate the first and prevent or mitigate the second. Moreover, the size of the company, the context of its operations and the severity of its adverse impacts are factors that contribute to the definition of the extent and nature of the due diligence process.⁵⁹⁸ In cases where a company has a large number of suppliers, the due diligence efforts should be prioritised in accordance with the level of risk of human rights impacts.⁵⁹⁹

When companies conduct due diligence and identify human rights impacts that they caused or contributed to, they should have processes in place to ensure remediation. This includes cooperating with judicial or State-based non-judicial mechanisms, but also the establishment of operational-level grievance mechanisms that fulfil the requirements of ‘legitimacy, accessibility, predictability, equitability, compatibility with the Guidelines and transparency, and are based on dialogue and engagement with a view to seeking agreed solutions.’⁶⁰⁰ In addition, operational-level grievance mechanisms ‘should not be used to undermine the role of trade unions in addressing labour-related disputes, nor should such mechanisms preclude access to judicial or non-judicial grievance mechanisms, including the National Contact Points under the Guidelines.’⁶⁰¹

Even though the Guidelines are non-binding and do not come with formal enforcement mechanisms, they are still ‘accompanied by a globally active grievance mechanism that aims to resolve issues arising under the Guidelines, including those linked to investments in companies which may be behaving irresponsibly.’⁶⁰² This grievance mechanism consists of National Contact Points (NCPs), which, together with the Investment Committee, are in charge of effectively implementing the Guidelines.⁶⁰³

⁵⁹⁷ *Idem*, paragraph 14 of the Commentary to Chapter II – General Policies, p. 23.

⁵⁹⁸ *Idem*, paragraph 15 of the Commentary to Chapter II – General Policies, p. 24.

⁵⁹⁹ *Idem*, paragraph 16 of the Commentary to Chapter II – General Policies, p. 24.

⁶⁰⁰ *Idem*, paragraph 46, p. 34.

⁶⁰¹ *Ibidem*.

⁶⁰² Roel Nieuwenkamp, ‘The Force of Finance for Responsible Business: How the financial sector could and should contribute to responsible business conduct’ (6 June 2016), available at: <http://oecdinsights.org/2016/06/06/finance-for-responsible-business-conduct/>.

⁶⁰³ UNEP Finance Initiative and Foley Hoag LLP (December 2015), p. 43; and Evaristus Oshionebo, ‘The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing’, 17 Lewis & Clark L Rev 545 (2013), p. 553.

The establishment of NCPs is one of the obligations incumbent on adhering countries, in addition to the duty to promote the Guidelines amongst MNEs operating in or from their territories.⁶⁰⁴ Although establishing the NCPs is mandatory for adhering countries, they enjoy considerable freedom as to their constitution and organisation, and they do not need to be similar across countries.⁶⁰⁵ NCPs have a triple mission: to promote the Guidelines in the country where they are based; to handle enquiries related to the Guidelines; and to play a conciliatory role, by contributing to the resolution of issues related to the implementation of the Guidelines,⁶⁰⁶ ‘*in specific instances*’ in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.⁶⁰⁷ This non-judicial mechanism is open to ‘all interested parties’, which includes the business community, worker organisations, NGOs and individuals.⁶⁰⁸

As a rule, interested parties should raise an issue with the NCP of the country in which that issue arose. Issues are initially dealt with at the national level and, if appropriate, they are subsequently dealt with bilaterally. ‘The NCP of the host country should consult with the NCP of the home country in its efforts to assist the parties in resolving the issues [and] [t]he NCP of the home country should strive to provide appropriate assistance in a timely manner when requested by the NCP of the host country.’⁶⁰⁹ Whenever multiple NCPs are involved in an issue, they should consult in order to determine which NCP takes the lead; the lead NCP should still consult with the other NCPs involved and they should all cooperate in the resolution of the issue.⁶¹⁰

There have been several issues raised with NCPs related to the financial sector, which can shed significant light on the specificity of the application of the Guidelines to banks. One such case was a complaint brought in 2012 by a consortium of NGOs to the Norwegian, Netherlands, and Korean NCPs, arguing that Pohang Iron and Steel Enterprise (POSCO), and its joint venture POSCO India Private Limited had breached the human rights provisions of the Guidelines. The complaint was also directed at two of POSCO's investors, the Dutch Pension Fund ABP, and its pension administrator APG, and the Norwegian Bank Investment Management (NBIM). The

⁶⁰⁴ See Roel Nieuwenkamp (6 June 2016).

⁶⁰⁵ Evaristus Oshionebo (2013), p. 554.

⁶⁰⁶ *OECD Guidelines for Multinational Enterprises* (2011), Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, paragraph I.1, p. 68.

⁶⁰⁷ *Idem*, Procedural Guidance, section C, p. 72.

⁶⁰⁸ *Ibidem*.

⁶⁰⁹ *Idem*, Coordination between NCPs in Specific Instances, paragraph 23, p. 82.

⁶¹⁰ *Idem*, Coordination between NCPs in Specific Instances, paragraph 24, p. 82.

NGOs argued that POSCO failed to: (1) seek to prevent or mitigate human rights impacts; (2) conduct comprehensive human rights due diligence; and (3) carry out environmental due diligence in its project to set up a steel plant in the Jagastinghpur District in Odisha, India. The three NCPs decided that each of them should handle the complaints raised against companies registered in their country; therefore, the Norwegian NCP assessed the complaint against NBIM, the Dutch NCP assessed the complaint against ABP and APG, and the Korean NCP assessed the complaint against POSCO. For the purposes of this research, we will focus on the 2013 final statement issued by the Norwegian NCP.⁶¹¹

The first issue addressed by the Norwegian NCP regarding the financial sector dealt with NBIM's submission that the Guidelines did not apply to minority shareholding. The NCP reiterated that the Guidelines apply to all businesses, including those in the financial sector, and stated that the question was not *if* the Guidelines applied to the financial sector and minority shareholding, but rather *how* they applied.⁶¹² The NCP thus affirmed that 'the impacts of a company in which an enterprise has invested are *directly linked by a business relationship* to the investor, and thus encompassed within the due diligence framework.'⁶¹³ Referring to a letter from the OHCHR,⁶¹⁴ which addressed questions related to the financial sector, the NCP indicated:

*The UN Guiding Principles cover minority shareholdings of institutional investors, which constitute a "business relationship" (...) The OECD Chapter on Human Rights builds upon and converges with the UN Guiding Principles on Business and Human Rights. The OECD Chapter on Human Rights is thus applicable to minority shareholders of institutional investors. There is little basis to argue that the OECD Guidelines as such are not applicable to investors.*⁶¹⁵

⁶¹¹ The Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, 'Final Statement: Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development vs. POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway)' (27 May 2013), available at: http://www.responsiblebusiness.no/files/2013/12/nbim_final.pdf, (hereinafter, 'Norway NCP, NBIM Specific Instance').

⁶¹² *Idem*, p. 22.

⁶¹³ *Ibidem*.

⁶¹⁴ OHCHR, 'Letter dated 26 April 2013 (interpretive guidance) from Craig Mokhiber, Chief of Development and Economic and Social Issues Branch, Office of the High Commissioner for Human Rights to Centre for Research on Multinational Corporations (SOMO)' (2013), available at: <http://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf>.

⁶¹⁵ Norway NCP, NBIM Specific Instance, p. 22.

Furthermore, all three NCPs agreed that the Guidelines applied to minority shareholding, and consequently to NBIM.⁶¹⁶ The second question assessed by the Norwegian NCP referred to the relevance of the status of NBIM as a State-owned company to the application of the Guidelines. The NCP reached the conclusion that '[t]he OECD Guidelines explicitly underscore that state owned enterprises are not exempt, and, on the contrary, suggests that public expectations are often even higher for state owned enterprises'.⁶¹⁷

A further question referred to the responsibility to conduct human rights due diligence, to which the Norwegian NCP replied:

Given that NBIM manages one of the largest funds in the world with potentially severe human rights impacts from some sectors - such as industrials, extractives and companies operating in high risk environments - a robust system of human rights due diligence is appropriate. At the same time, the human rights due diligence system must take into account the fact that NBIM invests in 7,000 companies, so it is not possible to scrutinize and engage each company in detail or even individually. (...)

It is not expected that each investor conduct due diligence on every company it considers for investment, especially not if the investment is based on a market weighted global benchmark index. However, the OECD Guidelines suggest that companies should use a risk-based approach that focuses due diligence on situations in which the severity and likelihood of adverse impacts are most significant.⁶¹⁸

The next issue referred to how NBIM should act after identifying the risks of human rights impacts. Firstly, in order to characterise the relationship between NBIM and the companies in which it invested, the NCP affirmed that '[i]nvestors are most likely to be *directly linked* to the impacts of their portfolio companies, in which case they should "[s]eek ways to prevent or mitigate those adverse human rights impacts ... even if they do not contribute to those impacts."⁶¹⁹ In this regard, the NCP stated:

The Guidelines recognise that companies that are directly linked to but do not cause or contribute to human rights impacts typically do not exercise control

⁶¹⁶ *Idem*, pp. 22-23.

⁶¹⁷ *Idem*, p. 23.

⁶¹⁸ *Idem*, pp. 29-30 (emphasis added).

⁶¹⁹ *Idem*, p. 34.

*over the party responsible for the impacts, but this does not relieve them of a responsibility to take steps to influence the situation once they are in a business relationship. In such an instance, the Guidelines indicate that a company is to “use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact,” acting alone or in cooperation with other actors.*⁶²⁰

It added that, in order to influence companies with which there is a business relationship, investors may use several tools, even if human rights impacts are only known after the investment is made, ‘including shareholder proposals, engagement with management, and the threat of divestment’.⁶²¹

Finally, the Norwegian NCP recalled that companies that do not cause or contribute to human rights impacts, but are rather directly linked to the impacts through a business relationship, do not have the obligation to provide remedies. Nevertheless, NBIM could still use its leverage over POSCO to encourage it to establish a remedial mechanism.⁶²²

The Working Party on Responsible Business Conduct later confirmed these findings,⁶²³ referring to the Interpretive Guide on the Corporate Responsibility to Respect Human Rights of the OHCHR, which states that ‘business relationships include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.’⁶²⁴

1.3. Other initiatives

There are several initiatives that aim at regulating corporate conduct and which have particular incidence over financial institutions. Firstly, it is important to mention the

⁶²⁰ *Ibidem*.

⁶²¹ *Idem*, p. 35.

⁶²² *Idem*, p. 40.

⁶²³ OECD Working Party on Responsible Business Conduct - Directorate for Financial and Enterprise Affairs, ‘Scope and Application of ‘Business Relationships’ in the Financial Sector Under the OECD Guidelines for Multinational Enterprises’ (2014), available at: <http://mneguidelines.oecd.org/global-forum/gfrbc-2014-financial-sector-document-2.pdf>, p. 5.

⁶²⁴ OHCHR, ‘The Corporate Responsibility to Respect Human Rights - An Interpretive Guide’ (2012), p. 5.

OECD Common Approaches,⁶²⁵ which constitute a recommendation by the OECD Council and are thus not legally binding. However, they should still be taken into account, considering that they convey ‘the common position or will of the whole OECD membership and therefore [are] considered to be an important political commitment for Member governments’.⁶²⁶ Specifically referring, among other instruments and standards, to the Guiding Principles and to the Guidelines, this Recommendation ‘sets common approaches for undertaking environmental and social due diligence to identify, consider and address the potential environmental and social impacts and risks relating to applications for officially supported export credits as an integral part of Members’ decision-making and risk management systems.’⁶²⁷ The recommendation thus states that, in order to achieve the goals listed, Export Credit Agencies should, *inter alia*, ‘[e]ncourage protection and respect for human rights, particularly in situations where the potential impacts from projects or existing operations pose risks to human rights.’⁶²⁸

Still at the OECD level, there are several projects related to the human rights responsibilities of the financial sector. One example is the Secretariat’s note entitled ‘Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship’,⁶²⁹ which develops the Guidelines and reaffirms, with detailed examples: (1) the human rights responsibility of financial institutions; (2) the irrelevance of causality for the determination of direct linkage, the latter not being limited to first-tier or immediate business relationships; and (3) the level and rigor of due diligence that a financial enterprise is expected to exercise depends on the nature of its business relationships.

Finally, it should be noted that the OECD is still undertaking work on the clarification of the human rights responsibilities of financial institutions, as demonstrated by the efforts made by the Working Party on Responsible Business Conduct, an

⁶²⁵ OECD Council, ‘Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence’ (7 April 2016), available at: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282016%293&docLanguage=en>; hereinafter, ‘Common Approaches’.

⁶²⁶ United Nations Environment Programme Finance Initiative and Foley Hoag LLP (December 2015), p. 46.

⁶²⁷ OECD, ‘Environmental and Social Due Diligence’ (2016), available at: <http://www.oecd.org/tad/xcred/environmentalandsocialduediligence.htm>.

⁶²⁸ OECD Council (7 April 2016), Common Approaches, p. 6.

⁶²⁹ OECD Global Forum on Responsible Business Conduct, ‘Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship’ (2014), available at: <http://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf>.

intergovernmental body established in 2013 and dedicated to ‘furthering the effectiveness of the Guidelines, fostering NCP functional equivalence, pursuing the *proactive agenda*, promoting engagement with non-adhering countries, partner organisations, and stakeholders, and serving as central point of information on the Guidelines.’⁶³⁰ The ‘proactive agenda’ employs a multi-stakeholder process and develops a number of projects intended to complement the specific instances procedure by clarifying several complex areas – namely, financial sector due diligence.

At the UN level, there are also several initiatives that should be mentioned, starting with the UNEP Finance Initiative (UNEP FI) and its Human Rights Guidance Tool for the Financial Sector, originally launched in 2007, updated in 2011 and fully revised in 2014, so as to adapt it to the evolving framework for business and human rights at the international level. This tool provides resources for financial institutions, and aims at helping them: (1) identify potential human rights risk in lending operations; (2) assess the materiality of the human rights risk; and (3) identify possible risk mitigants.⁶³¹ In essence, it ‘makes the business case for financial institutions to take into account human rights; addresses human rights by sectors and by topic; and provides resources that financial institutions may want to consult to deepen their knowledge on the issue.’⁶³²

Further examples of the engagement of the UN with the human rights responsibilities of businesses (comprising, or referring specifically to, financial institutions) include: (1) the UN Global Compact;⁶³³ (2) the collaborative work of the OHCHR and the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises; and (3) the efforts made by several specialised UN bodies and agencies, such as UNICEF’s Children’s Rights and Business Principles⁶³⁴ and the UN Global Compact Business Reference Guide to the UNDRIP,⁶³⁵ among others.

⁶³⁰ See <https://mneguidelines.oecd.org/about/> (emphasis added).

⁶³¹ See UNEP FI, ‘UNEP FI Human Rights Guidance Tool for the Financial Sector’ (2014), available at: <http://unepfi.org/humanrightstoolkit/>.

⁶³² UNEP Finance Initiative and Foley Hoag LLP (December 2015), p. 48.

⁶³³ Addressed in detail in the previous Chapter.

⁶³⁴ UNICEF with UN Global Compact and Save the Children, ‘Children’s Rights and Business Principles’ (2012), available at: https://www.unglobalcompact.org/docs/issues_doc/human_rights/CRBP/Childrens_Rights_and_Business_Principles.pdf.

⁶³⁵ UN Global Compact, ‘Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples’ (2013).

2. Multilateral Development Banks and Human Rights

Similarly to what occurred in relation to the human rights responsibilities of MNEs, international financial institutions such as the World Bank Group have been subject to growing pressure from NGOs and civil society, who advocate the integration of human rights policies and standards into their activities.

It should be noted that MDBs are

*(...) powerful development actors with considerable influence on the realization of large-scale investment projects such as infrastructure projects (e.g. building of roads, schools, hospitals, dams) or industrial projects for the exploitation of natural resources (e.g. pipelines, mining, oil drilling), [and thus] have a potentially huge impact on living conditions where the projects they finance are carried out.*⁶³⁶

The human rights accountability of MDBs can be seen from two complementary perspectives: a direct and an indirect approach. The *indirect approach* focuses on the fact that the member countries that compose MDBs have human rights responsibilities under a vast range of international human rights instruments, and their obligation to respect human rights applies both internally and when acting internationally.⁶³⁷ On several occasions, the Committee on Economic, Social and Cultural Rights emphatically confirmed this perspective.⁶³⁸ In line with this approach, the Maastricht Guidelines⁶³⁹ state that the obligations of States to protect ESC rights extend also to their participation in international organizations, including international financial institutions, where they should ‘use their influence’ to ensure the compatibility of international organisations’ operations and policies with ESC rights.⁶⁴⁰ When acting internationally, States should abide by standards that are not lower than the ones applied internally. However, it is very problematic to hold individual States

⁶³⁶ Nicolas Hachez and Jan Wouters, ‘A Responsible Lender? The European Investment Bank’s Environmental, Social and Human Rights Accountability’ The European Investment Bank’s Environmental, Social and Human Rights Accountability (September 7, 2011) Leuven Centre for Global Governance Studies Working Paper (2011), p. 2.

⁶³⁷ Sigrun Skogly, *Human Rights Obligations of the World Bank and the IMF* (Cavendish Publishing 2001), p. 109.

⁶³⁸ See UN Committee on Economic Social and Cultural Rights, ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Egypt’ (E/C.12/1/Add.44, 23 May 2000), paragraph 28.

⁶³⁹ See chapter 1, section 4.4, in relation to violations of cultural rights.

⁶⁴⁰ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997), paragraph 19 (emphasis added). A reproduction of the Maastricht Guidelines is available at: <http://www.ohchr.org/Documents/Publications/training12en.pdf>, p. 117.

accountable for the actions of an MDB and the indirect approach is thus not sufficient to ensure respect for human rights at that level.⁶⁴¹

It is thus crucial to understand if and how MDBs can have direct human rights accountability. According to Fujita, the *direct approach* stands on three elements: (1) the international legal personality of MDBs; (2) their connection to international organisations that explicitly include human rights in their mandate (e.g., the UN or the EU); and (3) MDBs' own mandates and commitments. In regard to the first element, commentators have relied on the fact that MDBs have international legal personality⁶⁴² to consider that they are subject to international law – and this includes treaty law, customary international law, general principles of law and *jus cogens*. While some authors emphasise the fact that MDBs are not party to human rights treaties in order to restrict their accountability to an obligation to respect, others defend a wider interpretation of the matter and affirm that MDBs are also obliged to protect and fulfil human rights.⁶⁴³

As to the second element, the links between MDBs and the international organisations that they are part of constitutes an explanation for the human rights accountability of the former. For instance, the WB is a part of the UN, which explicitly declares the promotion of human rights as one of its purposes,⁶⁴⁴ whilst the European Investment Bank (EIB) is a part of the EU, which is '(...) founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.⁶⁴⁵ The argument here is more political than legal, but it still attracts the support of several commentators.⁶⁴⁶

Regarding the third element, the connection between MDBs and human rights responsibility is established through the institutions' commitment to development,⁶⁴⁷ which is intimately related to human rights. The relationship between development

⁶⁴¹ Sanae Fujita, *The World Bank, Asian Development Bank and Human Rights - Developing Standards of Transparency, Participation and Accountability* (Edward Elgar Publishing 2013), pp. 6-7.

⁶⁴² See, for instance, Article 308 of the Treaty on the Functioning of the EU (TFEU), which states that '[t]he European Investment Bank shall have legal personality'. Equally, Article VI, section 2 of the IFC Articles of Agreement states that '[t]he Corporation shall possess full juridical personality (...)'.
⁶⁴³ Sanae Fujita (2013), p. 8.

⁶⁴⁴ Article 1(3) of the Charter of the UN states: 'The Purposes of the United Nations are: (...) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental freedoms* for all without distinction as to race, sex, language, or religion' (emphasis added).

⁶⁴⁵ See Articles 2 and 6 of the Treaty on European Union (TEU).

⁶⁴⁶ Sanae Fujita (2013), pp. 9-12.

⁶⁴⁷ See, for instance, Article 1 of the IFC Articles of Agreement; in relation to the EIB, see Article 309 TFEU.

and human rights is evident from a number of UN documents, such as the Declaration on the Right to Development (DRD),⁶⁴⁸ which affirms that, ‘in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights’.⁶⁴⁹

It should also be noted that the 2003 Interagency Common Understanding of a Human Rights-Based Approach to Development Programming, which makes reference to the UN’s long history of engagement with and mainstreaming of human rights, highlights the relationship between development cooperation and international human rights instruments, by affirming that all development programmes ‘should further the realisation of human rights’.⁶⁵⁰ More recently, on 22 September 2016, on the occasion of the commemoration of the 30th anniversary of the DRD, the UN High Commissioner for Human Rights affirmed that ‘development is about rights, and is itself a human right’.⁶⁵¹ Therefore, in the words of Fujita, ‘if [international financial institutions] are to fulfil their mandate to promote the “encouragement of development”, these Banks cannot ignore human rights considerations in their operations’.⁶⁵²

The legal challenge for MDBs generally resides in their mandates, which in some cases explicitly prohibit interference with political matters – and this prohibition is deemed to cover the subject of human rights. According to a survey conducted in 2011 by the EIB, the WB, the African Development Bank (AfDB), the IADB, the Islamic Development Bank (IsDB) and the IFC, all have political restrictions in their statutes that prohibit ‘interference in the political affairs of a member country or taking member

⁶⁴⁸ UN Declaration on the Right to Development (4 December 1986) A/RES/41/128.

⁶⁴⁹ Emphasis added. See also Article 1 of the DRD, which affirms: ‘The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.’

⁶⁵⁰ UN Development Group, ‘The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies’ (2003), available at: https://undg.org/main/undg_document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/.

⁶⁵¹ UN, ‘Statement by Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights at the High-level segment of the General Assembly - Commemoration of the 30th anniversary of the Declaration on the Right to Development’ (22 September 2016), available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20561&LangID=E>.

⁶⁵² Sanae Fujita (2013), p. 13.

governments' political character into account'.⁶⁵³ In the case of the IFC, such prohibition is stated in Article III, section 9:

The Corporation and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement.

Despite the so-called 'political prohibition', MDBs have a number of policies in place that support human rights, even if specific reference to human rights is absent from such policies. For instance, the WB adopted policies regarding indigenous peoples, gender equality and involuntary resettlement, which are all obviously connected to human rights – even if not explicitly acknowledged.

2.1. The International Finance Corporation

The World Bank Group constitutes the world's most powerful international financial institution. It comprises the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for the Settlement of Investment Disputes (ICSID). The IBRD and the IDA are specialised agencies of the UN; the first provides loans and other assistance to middle-income and credit-worthy poor countries, whereas the latter provides loans and grants to the poorest countries in the world. The IFC is the private sector lending arm of the World Bank Group, self-proclaimed 'the largest global development institution focused exclusively on the private sector in developing countries'.⁶⁵⁴ MIGA promotes foreign investment through political risk insurance guarantees to private sector investors and lenders. Lastly, the ICSID provides arbitration and conciliation services for governments and private foreign investors.

⁶⁵³ World Bank and OECD, *Integrating Human Rights into Development: Donor Approaches, Experiences, and Challenges* (2nd edn, 2013), p. 149.

⁶⁵⁴ This is stated in the 'About' section of the IFC's website: <http://www.ifc.org>.

Because the IBRD and the IDA deal with States, rather than private investors, this chapter will focus on the IFC.⁶⁵⁵

The IFC was launched in 1956, 'with \$100 million in capital, 12 staff and an ambitious goal: "Encouraging the growth of productive private enterprise" in three broad ways—investing, advising, and mobilizing capital from others.'⁶⁵⁶ It is currently owned by 184 member countries, and, in 2015, the IFC's long-term investments in developing countries were calculated at \$17.7 billion, of which over \$7 million was mobilised from other investors.⁶⁵⁷ According to Article 1 of the IFC's Articles of Agreement, '[t]he purpose of the Corporation is to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas'.

The IFC is independent from the other institutions in the World Bank Group, as per its Articles of Agreement,⁶⁵⁸ even though there are several situations in which they collaborate, mainly in three circumstances: firstly, the WB Environmental, Health and Safety Guidelines (EHS Guidelines) are applied by the IFC as 'technical reference documents with general and industry-specific examples of good international industry practice';⁶⁵⁹ secondly, the WB and the IFC often operate in the same country, and collaboration between both institutions usually means that their procedures may apply

⁶⁵⁵ For a detailed analysis of the relationship between the World Bank (IBRD and IDA) and human rights, see, *inter alia*, Mac Darrow, *Between light and shadow: the World Bank, the International Monetary Fund and International Human Rights Law*, vol 1 (Hart Publishing 2003); Sanae Fujita (2013); Jordi Agusti-Panareda, 'Transforming Weakness into Virtue-A Dialogue and Context Based Approach to Human Rights at the World Bank', 2 Hum Rts & Globalization L Rev 23 (2008); Rachel Ball, 'Doing it Quietly: The World Bank's Engagement with Human Rights', 34 Monash UL Rev 331 (2008); Suzanne Zhou, 'Reassessing the Prospects of a Human Rights Safeguard Policy at the World Bank', 15 Journal of International Economic Law 823 (2012); and UN General Assembly, *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms - Extreme poverty and human rights: Note by the Secretary-General (A/70/274)* (4 August 2015). For an interesting take on the subject, see also Eric A Posner, 'Should Human Rights Law Play a Role in Development?' *The World Bank Economic Review* 1 (2016).

⁶⁵⁶ IFC History, 1950s and 1960s — Up and Running, at: http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/ifc+history/50s+and+60s.

⁶⁵⁷ IFC, 'Annual Report' (2015), available at: http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/annual+report/2015+online+report/printed+version/printed+version, p. 3.

⁶⁵⁸ Article IV, section 6(a) of the IFC Articles of Agreement states: 'The Corporation shall be an entity separate and distinct from the Bank and the funds of the Corporation shall be kept separate and apart from those of the Bank'.

⁶⁵⁹ IFC, 'Performance Standards on Environmental and Social Sustainability' (2012), available at: http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes, Overview of Performance Standards on Environmental and Social Sustainability, paragraph 6, p. ii.

cumulatively to the same project;⁶⁶⁰ finally, the WB and the IFC share the same President.

The IFC (together with MIGA) has an inspection and accountability mechanism exercising ‘a centralized review and clearance function, independent from the line management of operations’.⁶⁶¹ the Compliance Advisor/Ombudsman (CAO), a position created in 1999 by the World Bank Group,⁶⁶² which is ‘an additional pillar in building a credible and responsive structure to ensure that projects are environmentally and socially sound and enhance IFC’s and MIGA’s contribution to sustainable development.’⁶⁶³ The Ombudsman is a recourse and accountability mechanism and independent office appointed by, and reporting to, the President of the WB/IFC.⁶⁶⁴ The mandate of the CAO is to (1) ‘[a]ddress complaints from people affected by IFC/MIGA projects (or projects in which those organizations play a role) in a manner that is fair, objective, and equitable; and (2) [e]nhance the environmental and social outcomes of IFC/MIGA projects (or projects in which those organizations play a role).’⁶⁶⁵ The CAO offers redress for environmental and/or social negative impacts of IFC/MIGA projects and it is available to affected communities and individuals, at any time in the life of a project, relating to any aspect of a project’s planning, implementation, or impact.

The role of the CAO is threefold. First, it plays a *dispute resolution* role, whereby it receives complaints from affected individuals and/or groups and attempts to resolve the issues raised ‘using a flexible, collaborative, problem-solving approach’.⁶⁶⁶ Second, it ‘oversees *compliance investigations* of the environmental and social performance of IFC and MIGA, particularly in relation to sensitive projects, to ensure compliance with policies, standards, guidelines, procedures, and conditions for IFC/MIGA involvement, with the goal of improving IFC/MIGA environmental and social performance’.⁶⁶⁷ Finally, it provides *independent advice* on environmental and social issues to the President and senior management. Complaints are to be

⁶⁶⁰ Elisa Morgera, ‘Significant trends in corporate environmental accountability: the new performance standards of the international finance corporation’, 18 Colo J Int’l Env’tl L & Pol’y 151 (2007), p. 154.

⁶⁶¹ Office of the CAO, ‘Terms of Reference’, available at: http://www.cao-ombudsman.org/about/whowere/documents/TOR_CAO.pdf, p. 1.

⁶⁶² CAO, ‘Operational Guidelines’ (2013), available at: http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf, p. 4.

⁶⁶³ Office of the CAO, ‘Terms of Reference’, p. 1.

⁶⁶⁴ *Idem*, p. 2.

⁶⁶⁵ CAO (2013), ‘Operational Guidelines’, p. 4.

⁶⁶⁶ *Ibidem*.

⁶⁶⁷ *Idem*, p. 5.

submitted in writing, with no specific formal requirements and in any language; upon receiving a complaint, the CAO acknowledges its receipt and screens it against eligibility criteria. If a complaint is deemed eligible, the CAO will assess it to determine whether to trigger its dispute resolution or compliance role; the first is voluntary and requires agreement between the complainant and the client, whilst the second focuses on the performance of the IFC/MIGA and comprises the two stages of compliance appraisal and compliance investigation.⁶⁶⁸

It appears clear that the IFC, much like other MDBs, is 'acutely aware of the negative impacts which may be occasioned as a result of financing activities and [has] developed policies and guidelines to minimise the social and environmental impacts of these activities.'⁶⁶⁹ These policies and guidelines are essential and should be examined, not only because they apply to IFC activities, which are very significant, but also because they constitute fundamental benchmarks for the conduct of financial institutions, as evidenced by initiatives such as the Equator Principles,⁶⁷⁰ which will be assessed in the third Section of this Chapter. In fact, because the IFC has become 'the largest source of loan and equity financing to the private sector in developing countries',⁶⁷¹ it has progressively become extremely influential over its clients and a standard-setter for other financial institutions.

The IFC's Policy and Performance Standards on Environmental and Social Sustainability, together with the IFC's Access to Information Policy, compose its Sustainability Framework, which 'articulates the Corporation's strategic commitment to sustainable development, and is an integral part of IFC's approach to risk management'.⁶⁷²

The IFC has in place eight Performance Standards (PSs), which address: (1) Assessment and Management of Environmental and Social Risks and Impacts; (2) Labour and Working Conditions; (3) Resource Efficiency and Pollution Prevention; (4) Community Health, Safety, and Security; (5) Land Acquisition and Involuntary Resettlement; (6) Biodiversity Conservation and Sustainable Management of Living

⁶⁶⁸ *Idem*, pp. 18 and 22.

⁶⁶⁹ Adebola Adeyemi, 'Changing the Face of Sustainable Development in Developing Countries: The Role of the International Finance Corporation', 16 *Environmental Law Review* 91 (2014), p. 94.

⁶⁷⁰ Steven Herz et al., 'The International Finance Corporation's Performance Standards and the Equator Principles: Respecting Human Rights and Remediating Violations?' Center for International Environmental Law, Oxfam Australia, World Resources Institute August (2008), p. 2.

⁶⁷¹ Adebola Adeyemi (2014), p. 95.

⁶⁷² IFC, 'Performance Standards on Environmental and Social Sustainability' (2012), Overview of Performance Standards on Environmental and Social Sustainability, paragraph 1, p. i.

Natural Resources; (7) Indigenous Peoples; and (8) Cultural Heritage. The PSs 'are directed towards clients, providing guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities.'⁶⁷³

These PSs should be considered together as a whole, as more than one can apply to the same project, and they should be cross-referenced, as they deal transversely with issues such as climate change, gender, water and human rights. The fact that the PSs refer explicitly to human rights constitutes a very welcome development. In addition to requiring clients to apply the PSs, the IFC also highlights the fact that they should comply with both national and international law,⁶⁷⁴ as well as the World Bank Group EHS Guidelines.⁶⁷⁵ The latter is most important since, if host State regulations establish standards that are different from the EHS Guidelines, the more stringent will apply.⁶⁷⁶

It is important to note that, as a part of the review of environmental and social risks and impacts of a proposed investment, the IFC has a categorisation process in place, whereby projects are classified in accordance with the magnitude of environmental and social risks and impacts. The categories for classification of projects are as follows: (1) Category A refers to activities with potential significant adverse environmental or social risks and/or impacts that are diverse, irreversible, or unprecedented; (2) Category B corresponds to activities with potential limited adverse environmental or social risks and/or impacts that are few in number, generally site-specific, largely reversible, and readily addressed through mitigation measures; (3) Category C refers to activities with minimal or no adverse environmental or social risks and/or impacts; (4) Category FI corresponds to activities involving investments in financial institutions or through delivery mechanisms involving financial intermediation; this category is further divided into three sub-categories: FI-1, FI-2 and FI-3, depending on the magnitude of risks and impacts.⁶⁷⁷ If a project is categorised as category C, there is no further action required beyond screening.

⁶⁷³ *Ibidem*.

⁶⁷⁴ *Idem*, Overview of PSs on Environmental and Social Sustainability, paragraph 5, p. ii.

⁶⁷⁵ *Idem*, Overview of PSs on Environmental and Social Sustainability, paragraph 6, p. ii.

⁶⁷⁶ *Idem*, Overview of PSs on Environmental and Social Sustainability, paragraph 7, p. ii.

⁶⁷⁷ See IFC, 'Environmental and Social Review Procedures Manual: Environment, Social and Governance Department' (2015), available at: http://www.ifc.org/wps/wcm/connect/d0db8c41-cfb0-45e9-b66a-522c88f270a5/ESRP_Oct2016.pdf?MOD=AJPERES, pp. 2-3

Project categorisation as A, B or FI will determine the level of scrutiny and disclosure of information by the IFC.

Taking the above into account, it is now important to analyse the content of the most relevant PSs, which are those that can be related to cultural rights, namely PSs 1, 5, 7 and 8.

a) Performance Standard 1

PS1 refers to Assessment and Management of Environmental and Social Risks and Impacts and it underscores the importance of having in place an Environmental and Social Management System (ESMS), ‘a dynamic and continuous process initiated and supported by management, [which] involves engagement between the client, its workers, local communities directly affected by the project (...) and, where appropriate, other stakeholders.’⁶⁷⁸ It applies to all business activities that may entail social and environmental impacts and risks and it implies a continued process of “plan, do, check, and act,” whereby environmental and social risks and impacts are managed in a way that is adequate to each project’s nature and scale.

The ESMS should come as a result of adequate Environmental and Social Impact Assessment (ESIA) and it should include a number of elements. First, a *policy*, specifying compliance with relevant laws and regulations and the principles of the PSs, in addition to identifying who is responsible for the execution of the policy.⁶⁷⁹ Second, the *identification of risks and impacts* through due diligence processes that address all relevant risks and impacts – including those contained in PSs 2 to 8 – covering risks or impacts caused by third parties and the primary supply chain, and taking into account the position of disadvantaged and vulnerable individuals or groups.⁶⁸⁰

Third, clients are required to establish *management programs*, defining mitigation and performance improvement measures and actions, favouring avoidance over minimisation, and establishing flexible environmental and social Action Plans to address the risks and impacts identified in the course of the due diligence process.⁶⁸¹

⁶⁷⁸ *Idem*, Performance Standard 1, paragraph 1, p. 1.

⁶⁷⁹ *Idem*, PS1, paragraph 6, pp. 2-3.

⁶⁸⁰ *Idem*, PS1, paragraphs 7-12, pp. 3-4.

⁶⁸¹ *Idem*, PS1, paragraphs 13-16, pp. 4-5.

Fourth, clients should build on their *organisational capacity and competency*, by establishing, preserving and strengthening an organisational structure, and defining roles, responsibilities and authority to implement the ESMS, with the possibility of involving external experts.⁶⁸²

Fifth, clients should focus on *emergency preparedness and response*, by establishing and maintaining a periodically reviewed system that allows for prompt response to accidental and emergency situations, whilst ensuring the prevention and mitigation of any harm to people and/or the environment.⁶⁸³

Sixth, clients need to ensure *stakeholder engagement* through an on-going process, involving stakeholder analysis and planning, disclosure and dissemination of information, consultation and participation, grievance mechanisms, and reporting to stakeholders, with a view to building strong, constructive, and responsive relationships. IFC clients will have to establish a Stakeholder Engagement Plan, which allows for the inclusion of disadvantaged or vulnerable groups, and, if representation of groups is required, the proper representative should be identified. Where project location is still undetermined, clients need to set up a Stakeholder Engagement Framework, containing a strategy to identify and engage with the relevant stakeholders. Disclosure of relevant information is also mandatory, as well as Informed Consultation and Participation of affected communities. In some projects involving indigenous peoples, FPIC will be required, in accordance with PS7. Furthermore, clients are required to implement and maintain a procedure for external communications, as well as grievance mechanisms to address concerns and grievances brought by stakeholders in relation to the project's environmental and social impacts.⁶⁸⁴ The latter should consist of an 'understandable and transparent consultative process that is culturally appropriate and readily accessible, and at no cost and without retribution to the party that originated the issue or concern.'⁶⁸⁵

Finally, with regard to *monitoring and review*, IFC clients are expected to set up mechanisms that allow for the monitoring and management of the effectiveness of the ESMS, as well as with legal, contractual and regulatory requirements. In certain circumstances, the client is required to ensure the participation of governments, affected communities and third parties and, if necessary, the company should resort

⁶⁸² *Idem*, PS1, paragraphs 17-19, pp. 5-6.

⁶⁸³ *Idem*, PS1, paragraphs 20-21, p. 6.

⁶⁸⁴ *Idem*, PS1, paragraphs 25-33, pp. 7-9.

⁶⁸⁵ *Idem*, PS1, paragraph 35, p. 9.

to external experts. The client is furthermore expected to establish dynamic mechanisms to verify compliance (such as inspections and audits) and to implement corrective and preventive actions.⁶⁸⁶ Periodic performance reviews should be presented to senior management, who ‘will take the necessary and appropriate steps to ensure the intent of the client’s policy is met, that procedures, practices, and plans are being implemented, and are seen to be effective.’⁶⁸⁷

In conclusion, the objectives of PS1 are to identify and assess risks and impacts; to provide a mitigation framework that allows for the avoidance (or, if that is not possible, for the minimisation) of such risks and impacts; to incentivise clients to have a better social and environmental performance; to ensure that grievances and communications from stakeholders are addressed; to promote adequate engagement with stakeholders throughout the entire cycle of projects, as well as to ensure transparency and disclosure of relevant environmental and social information.⁶⁸⁸

b) Performance Standard 5

PS5 acknowledges that IFC financed projects may entail land acquisition, restrictions on land use and involuntary resettlement, which may cause serious adverse effects on affected communities. Involuntary resettlement is understood as comprising *physical displacement* (whenever communities are relocated or lose shelter) and *economic displacement* (whenever communities lose assets or access to them, leading to loss of income sources or other means of livelihood), and it is deemed to be *involuntary* whenever the affected groups are unable to refuse land acquisition or restrictions on land use.⁶⁸⁹ It is stated that involuntary resettlement should be avoided in principle; however, in cases where avoidance is impossible, resettlement should be minimised and clients are required to plan and implement mitigation measures.⁶⁹⁰ PS5 further affirms that ‘[t]o help avoid expropriation and eliminate the need to use governmental authority to enforce relocation, clients are encouraged to use negotiated settlements meeting the requirements of this Performance Standard, even if they have the legal means to acquire land without the seller’s consent.’⁶⁹¹

⁶⁸⁶ *Idem*, PS1, paragraphs 22-24, pp. 6-7.

⁶⁸⁷ *Idem*, PS1, paragraph 24, p. 7.

⁶⁸⁸ *Idem*, PS1, pp. 1-2.

⁶⁸⁹ *Idem*, PS5, paragraph 1, p. 1.

⁶⁹⁰ *Idem*, PS5, paragraph 2, p. 1.

⁶⁹¹ *Idem*, PS5, paragraph 3, p. 1.

The objectives of PS5 are: to avoid (and if that is impossible, minimise) displacement; to avoid forced eviction; to anticipate and avoid (and if that is impossible, minimise) adverse social and economic impacts from land acquisition or restrictions on land use (offering compensation for loss of assets at replacement cost and guaranteeing that resettlement activities are accompanied with appropriate disclosure of information, consultation, and the informed participation of relevant stakeholders); to advance or restore the livelihoods and standards of living of displaced communities; to improve living conditions among physically displaced communities through the provision of suitable housing with security of tenure (i.e., to lands which they can legally occupy and where they are protected from eviction) at resettlement sites.⁶⁹²

The applicability of PS5 should be assessed at the time of the due diligence process established in PS1, and its implementation should be managed through the ESMS. It does not apply to situations where resettlement results from voluntary land transactions or where impacts on the livelihood of stakeholders do not come as a consequence of changes to land use – these situations might, however, be covered by PS1. If, nevertheless, the impact on land, assets or access to assets becomes significantly severe, IFC clients are invited to apply the requirements of PS5.⁶⁹³

PS5 starts by stating that clients are expected to consider alternatives for project design so as to avoid or minimise physical and/or economic displacement, ‘while balancing environmental, social, and financial costs and benefits, paying particular attention to impacts on the poor and vulnerable.’⁶⁹⁴ However, if displacement is unavoidable, clients should offer the displaced groups or individuals compensation for loss of assets at full replacement cost, as well as help them restore or improve their standards of living or livelihood. The standards for compensation should be transparent and apply equally to all communities and persons affected by the displacement, and the client is expected to offer such compensation before he takes possession of the land and/or assets. The process of stakeholder engagement provided in PS1 applies in these situations, and affected communities should have access to all relevant information and be able to participate at all stages of the project. Equally, grievance mechanisms should be established so as to allow affected communities and individuals to have their concerns addressed.⁶⁹⁵

⁶⁹² *Idem*, PS5, pp. 1-2.

⁶⁹³ *Idem*, PS5, paragraphs 4-7, pp. 2-3.

⁶⁹⁴ *Idem*, Performance Standard 5, paragraph 8, p. 3.

⁶⁹⁵ *Idem*, Performance Standard 5, paragraphs 8-11, pp. 3-4.

In cases where involuntary resettlement is unavoidable, the client should carry out a census, in order to determine who will be displaced, as well as who is entitled to compensation and assistance. If the affected individuals reject compensation calculated on the basis of PS5, the client is invited to collaborate with the relevant government agency so as to play an active role in resettlement planning, implementation, and monitoring. Moreover, the client is required to establish procedures to monitor and evaluate the implementation of a Resettlement Action Plan or Livelihood Restoration Plan. This implementation will be deemed complete as soon as the adverse impacts of involuntary resettlement are addressed in accordance with PS5, which may require external audits.⁶⁹⁶

If it is impossible to determine the exact nature or magnitude of the land acquisition or restrictions on land use for a given project, clients are required to formulate a Resettlement and/or Livelihood Restoration Framework in line with PS5. As soon as it becomes possible to determine the adverse impacts, said Framework should be expanded into a Resettlement Action Plan or Livelihood Restoration Plan.⁶⁹⁷

A Resettlement Action Plan consists of a plan to be applied in case of physical displacement, and it should include compensation at full replacement cost. The purpose of this plan is to ‘mitigate the negative impacts of displacement; identify development opportunities; develop a resettlement budget and schedule; and establish the entitlements of all categories of affected persons (including host communities)’.⁶⁹⁸ On the other hand, a Livelihood Restoration Plan is to be implemented in case of economic displacement, and it is meant to compensate affected communities and individuals, as well as assisting them in accordance with the principles of PS5. This plan aims at identifying the entitlements of affected communities and individuals, and ensure that they are provided in a transparent, consistent, and equitable way.⁶⁹⁹

In cases of physical displacement, clients are further required to allow affected communities and individuals to have a choice amongst the possible resettlement options, and provide assistance throughout the resettlement process. If a new site is built for resettled communities and individuals, it should be of a sufficiently high standard to guarantee the improvement of their living conditions. The resettlement

⁶⁹⁶ *Idem*, Performance Standard 5, paragraphs 12-15, p. 4.

⁶⁹⁷ *Idem*, Performance Standard 5, paragraph 16, p. 5.

⁶⁹⁸ *Idem*, Performance Standard 5, paragraph 19, p. 5.

⁶⁹⁹ *Idem*, PS5, paragraph 25, p. 6.

process is also required to take into account existing social and cultural institutions of the displaced communities and individuals. Finally, forced evictions are prohibited, unless they are undertaken with due respect for the applicable law and the principles of PS5.⁷⁰⁰

In cases of economic displacement, PS5 clearly indicates that IFC clients should compensate the loss of assets, or loss of access to assets, at full replacement cost. In addition, economically displaced individuals and communities (whose livelihoods or income levels are adversely affected) are not only entitled to the abovementioned compensation, but also to 'opportunities to improve, or at least restore, their means of income-earning capacity, production levels, and standards of living'.⁷⁰¹

Finally, whenever the host government is responsible for land acquisition and resettlement, IFC clients are expected to collaborate and, if necessary, supplement the action of the relevant government agency through the implementation of a Supplemental Resettlement Plan (in case of physical displacement) or an Environmental and Social Action Plan (in case of economic displacement), so as to ensure that the process is aligned with PS5.⁷⁰²

c) Performance Standard 7

PS7 addresses the situation of indigenous peoples who are adversely affected by IFC-financed projects. It starts by acknowledging some very important points: that indigenous peoples, 'as social groups with identities that are distinct from mainstream groups in national societies, are often among the most marginalized and vulnerable segments of the population', especially 'if their lands and resources are transformed, encroached upon, or significantly degraded'. It also acknowledges that '[t]heir languages, cultures, religions, spiritual beliefs, and institutions may also come under threat and that their 'vulnerability may include loss of identity, culture, and natural resource-based livelihoods, as well as exposure to impoverishment and diseases.'⁷⁰³ Furthermore, PS7 recognises the importance of indigenous peoples for the attainment of sustainable development.

⁷⁰⁰ *Idem*, PS5, paragraphs 19-24, pp. 5-6.

⁷⁰¹ *Idem*, PS5, paragraphs 25-28, pp. 6-7.

⁷⁰² *Idem*, PS5, paragraphs 30-32, pp. 7-8.

⁷⁰³ *Idem*, PS7, paragraph 1, p. 1.

In line with these considerations, the objectives of this PS are set with explicit reference to human rights, which is a very positive feature,⁷⁰⁴ and include the following: ensuring full respect for the human rights, dignity, aspirations, *culture*, and natural resource-based livelihoods of indigenous peoples; anticipating and avoiding adverse impacts or, if that is impossible, minimising and/or compensating such impacts; promoting sustainable development opportunities and benefits for indigenous peoples, *in a culturally appropriate way*; setting up and maintaining an enduring relationship based on Informed Consultation and Participation (ICP) with affected indigenous peoples, throughout all stages of the project; ensuring the FPIC of indigenous peoples when applicable; and, finally, respecting and preserving the *culture, knowledge, and practices* of indigenous peoples.⁷⁰⁵

Similarly to what occurs with PS5, the applicability of PS7 should be determined during the due diligence process established in PS1. Necessary actions should be implemented through the client's ESMS.⁷⁰⁶

PS7 acknowledges that there is no overarching and universal definition of what constitutes an 'indigenous people', but it does provide a number of indicators that should be taken into account when establishing the applicability of this PS: (1) self-identification as indigenous, and external recognition of this identity; (2) collective attachment to habitats, ancestral territories and their natural resources; (3) presence of separate and distinct customary cultural, economic, social, or political institutions; and, finally, (4) use of a distinct language or dialect. In addition, PS7 can also apply to communities that have lost the collective attachment to their ancestral territories due to 'forced severance, conflict, government resettlement programs, dispossession of their lands, natural disasters, or incorporation of such territories into an urban area.'⁷⁰⁷

The assessment of risks during the due diligence process should serve to identify indigenous peoples that may be adversely affected by an IFC-funded project, as well as the nature and degree of direct and indirect impacts on their culture (including cultural heritage, which is covered in more detail by PS8), and on economic, social

⁷⁰⁴ Very interestingly, the IFC had already included express reference to human rights in their performance standards regarding indigenous peoples in previous versions: the 2006 version is one such example, but it is important to note that the WB's Operational Directive 4.20, of September 1991, which was applied by the IFC, also referred explicitly to human rights.

⁷⁰⁵ Cf. IFC, 'Performance Standards on Environmental and Social Sustainability' (2012), PS7, p. 1.

⁷⁰⁶ *Idem*, PS7, paragraph 3, p. 1.

⁷⁰⁷ *Idem*, PS7, paragraphs 4-7, p. 2.

and environmental conditions of the affected communities. Once again, the IFC prioritises avoidance of adverse impacts, but, whenever that is impossible, PS7 requires clients to minimise, restore and/or compensate for these adverse impacts *in a culturally appropriate way*, adequate to the nature and scale of the impacts and the vulnerability of the affected communities. ICP is required for proposed actions directed at tackling the risks identified through the due diligence process, and it should be integrated into an Indigenous Peoples Plan, or a broader community development plan with separate components for Indigenous Peoples.⁷⁰⁸

In terms of participation and consent, PS7 provides for specific forms of stakeholder engagement, which go beyond the requirements of PS1 for disclosure of information, consultation and participation, and specifically require the involvement of traditional representative bodies and institutions, as well as timeframes that take into account traditional decision-making processes. In particular, there are several situations considered by the IFC to require the FPIC of indigenous communities, covering project design, implementation, and expected outcomes related to identified and predicted impacts (which should be assessed with the participation of external experts).⁷⁰⁹ In absence of a universally accepted definition of FPIC, its meaning is described as follows:

*FPIC builds on and expands the process of ICP described in Performance Standard 1 and will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.*⁷¹⁰

FPIC is required in three circumstances under PS7: when the client identifies impacts on lands and natural resources subject to traditional ownership or under customary use (even in cases where there is no legal title to these lands); if it is necessary to undertake relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use; and whenever there is the risk of

⁷⁰⁸ *Idem*, PS7, paragraphs 8-9, p. 2.

⁷⁰⁹ *Idem*, PS7, paragraphs 10-11, p. 3.

⁷¹⁰ *Idem*, PS7, paragraph 12, p. 3 (emphasis added).

significant adverse impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples' lives (including when cultural heritage, comprising traditional knowledge, is to be used commercially).⁷¹¹

In these cases that require FPIC, IFC clients are expected to adopt the following actions: (1) documenting efforts to avoid and otherwise minimise the area of land proposed for the project; (2) documenting efforts to avoid and otherwise minimise impacts on natural resources and natural areas of importance to indigenous peoples; (3) identifying and reviewing all property interests and traditional resource uses prior to purchasing or leasing land; (4) assessing and documenting resource use without prejudicing any indigenous peoples' land claim, in a gender-inclusive manner; (5) ensuring that the affected communities are informed of their land rights under national laws, including those recognising customary use rights; and (6) offering affected communities compensation and due process in the case of commercial development of their land and natural resources, together with culturally appropriate sustainable development opportunities.⁷¹²

The last requirement, regarding compensation and due process, includes: (1) if possible, providing land-based compensation or compensation-in-kind in lieu of cash compensation; (2) ensuring continued access to natural resources, identifying the equivalent replacement resources, or, as a last option, providing compensation and identifying alternative livelihoods; (3) ensuring fair and equitable sharing of benefits associated with project usage of the resources that are essential for the identity and livelihood of the affected communities; and (4) providing them with access, usage, and transit on developed land, subject to overriding health, safety, and security considerations.⁷¹³

PS7 further requires IFC clients to identify mitigation measures in accordance with PS1, as well as 'opportunities for culturally appropriate and sustainable development benefits.'⁷¹⁴ Moreover, compensation should be determined, delivered and distributed with due regard to indigenous peoples' traditional institutions and customs, and it can occur individually or collectively (or as a combination of both).⁷¹⁵

⁷¹¹ *Idem*, PS7, paragraphs 13-17, pp. 3-5.

⁷¹² *Idem*, PS7, paragraph 14, p. 4.

⁷¹³ *Ibidem*.

⁷¹⁴ *Idem*, PS7, paragraph 18, p. 5.

⁷¹⁵ *Idem*, PS7, paragraph 19, p. 5.

The last point covered in PS7 refers to situations where the host government is responsible for managing issues associated with indigenous peoples. Similarly to what occurs with PS5, IFC clients are expected to collaborate and, if necessary, supplement the action of the relevant government agency. In such situations, clients are required to prepare a plan addressing the requirements of PS7.⁷¹⁶

In light of the above, it is important to highlight the progress achieved in the formulation of PS7. The requirement of FPIC for projects that adversely affect indigenous peoples, even if restricted to the situations noted above, is a very positive development in the IFC PSs. In fact, the 2006 version of PS7 only required 'free, prior, and informed *consultation*', which provides for a much lower level of protection than FPIC. At the time of the 2006 version of PS7, commentators criticised this option, which was considered to be a serious failure of the PSs:

*The choice to refer to "consultations and participation" rather than to the need to obtain the prior informed consent of these communities, particularly when they include indigenous peoples, does not reflect established international environmental standards.*⁷¹⁷

Another aspect of PS7 that denotes positive development, in light of international best practices and in accordance with HRL, was the new reference to gender inclusion, through which the role of women is not only taken into account but also protected on a number of occasions.⁷¹⁸

d) Performance Standard 8

PS8 acknowledges the importance of cultural heritage for current and future generations, and makes reference to international law instruments such as the WHC and the Convention on Biological Diversity.⁷¹⁹ The goals of PS8 are to protect cultural heritage from adverse impacts caused by IFC-funded projects, as well as to support its preservation and promote the equitable sharing of benefits associated with the use of cultural heritage.⁷²⁰ Similarly to what occurs with PS5 and PS7, the applicability of

⁷¹⁶ *Idem*, PS7, paragraphs 21-22, p. 6.

⁷¹⁷ Elisa Morgera (2007), p. 166.

⁷¹⁸ In this sense, Adebola Adeyemi (2014), p. 99.

⁷¹⁹ Cf. IFC, 'Performance Standards on Environmental and Social Sustainability' (2012), PS8, paragraph 1, p. 1.

⁷²⁰ *Idem*, PS8, p. 1.

PS8 should be determined during the due diligence process established in PS1. Necessary actions should be implemented through the client's ESMS.⁷²¹

PS8 defines cultural heritage as:

*(i) tangible forms of cultural heritage, such as tangible moveable or immovable objects, property, sites, structures, or groups of structures, having archaeological (prehistoric), paleontological, historical, cultural, artistic, and religious values; (ii) unique natural features or tangible objects that embody cultural values, such as sacred groves, rocks, lakes, and waterfalls; and (iii) certain instances of intangible forms of culture that are proposed to be used for commercial purposes, such as cultural knowledge, innovations, and practices of communities embodying traditional lifestyles.*⁷²²

Even though this definition is quite comprehensive, it is important to note that intangible cultural heritage is only protected by PS8 in the event of a project's use of knowledge, innovations, or practices of local communities for commercial purposes. In such situations, IFC clients are required to inform the affected communities of their rights under national law; the scope and nature of the proposed commercial development; and the potential consequences of such development. In addition, commercial use of intangible cultural heritage is only allowed if the client enters into a process of ICP, in good faith, as determined in PS1, and if fair and equitable sharing of benefits is sought.⁷²³

Still in terms of scope of application, PS8 applies to cultural heritage independently of whether or not it has been legally protected or previously disturbed. In addition, PS8 does not apply to the cultural heritage of indigenous peoples.⁷²⁴ Commentators have criticised this exclusion, as PS7 and PS8 appear to present contradictory language. In fact, in PS7 there is a footnote stating that '[a]dditional requirements on protection of cultural heritage are set out in Performance Standard 8', even though the latter explicitly excludes the cultural heritage of indigenous peoples. As a result, if tangible manifestations of indigenous peoples' cultural heritage are found in a project area, PS8 does not apply and refers to PS7, which in turn circularly acknowledges the requirements of PS8. According to Mason,

⁷²¹ *Idem*, PS8, paragraph 2, p. 1.

⁷²² *Idem*, PS8, paragraph 3, p. 1.

⁷²³ *Idem*, PS8, paragraph 16, p. 4.

⁷²⁴ *Idem*, PS8, paragraph 5, p. 1.

(...) the underlying logic of these requirements does not withstand scrutiny and leaves one to draw his or her own conclusions on how to manage tangible manifestations of indigenous cultural heritage. Subject matter experts will need to follow the spirit of the Performance Standards and internationally recognized good practice until such time that the text of Performance Standards 7 and 8 can be amended to correct this incongruence. It is likely that the authors of the Performance Standards expect PS8 to apply to most manifestations of cultural heritage (both tangible and intangible), whereas PS7 is meant to apply to intangible manifestations of culture associated with living groups of Indigenous Peoples.⁷²⁵

PS8 starts by stating that, in addition to complying with the relevant national law (namely regarding the implementation of the WHC), the client is required to identify and protect cultural heritage by guaranteeing the implementation of internationally recognised practices for the protection, field-based study, and documentation of cultural heritage, which should be done with resort to experts.⁷²⁶

With regard to chance finds (i.e., tangible cultural heritage that is found unexpectedly during project construction and operation), PS8 requires clients' ESMS to provide a chance find procedure that allows them to address situations where cultural heritage is found after the due diligence process takes place. If such cultural heritage is indeed found, IFC clients should not disturb it until a professional assessment is made and an appropriate course of action is taken in accordance with this PS.⁷²⁷

Engagement with stakeholders is also required under PS8. In fact, whenever a project risks adversely impacting cultural heritage, clients should undertake consultations with the affected communities, as well as local or national authorities, in order to identify cultural heritage of importance and thus incorporate their views into decision-making processes.⁷²⁸

In cases where a project area contains cultural heritage or somehow prevents communities from accessing such heritage, clients should allow continued access to the cultural site or will provide an alternative access route, in accordance with the

⁷²⁵ Andrew Mason, 'International Project Financing and Cultural Heritage Protection', 19 International Journal of Cultural Property 556 (2012), p. 559.

⁷²⁶ IFC, 'Performance Standards on Environmental and Social Sustainability' (2012), PS8, paragraphs 6-7, pp. 1-2.

⁷²⁷ *Idem*, PS8, paragraph 8, p. 2.

⁷²⁸ *Idem*, PS8, paragraph 9, p. 2.

consultations mentioned above and subject to overriding health, safety, and security considerations.⁷²⁹

PS8 defines replicable cultural heritage as:

*tangible forms of cultural heritage that can themselves be moved to another location or that can be replaced by a similar structure or natural features to which the cultural values can be transferred by appropriate measures. Archeological or historical sites may be considered replicable where the particular eras and cultural values they represent are well represented by other sites and/or structures.*⁷³⁰

If a client finds cultural heritage that is replicable and not critical, he should apply mitigation measures directed at avoidance of negative impacts. However, if that is not feasible, he should apply the following mitigation hierarchy: (1) minimising adverse impacts and implement restoration measures *in situ*, ensuring the maintenance of value and functionality of the cultural heritage; (2) if restoration *in situ* is not possible, restoring the functionality of the cultural heritage in a different location; (3) if permanent removal is necessary, the client should take into account the principles of PS8; (4) if neither of these options are feasible and where affected communities use the cultural heritage, clients should compensate them for loss of cultural heritage.⁷³¹ Permanent removal of non-replicable cultural heritage is prohibited unless the following is verified: (1) there are no technically or financially feasible alternatives to removal; (2) the overall benefits of the project decisively outweigh the anticipated cultural heritage loss from removal; and (3) any removal is conducted using the best available techniques.⁷³²

Critical cultural heritage is defined in the PSs as:

(i) the internationally recognized heritage of communities who use, or have used within living memory the cultural heritage for long-standing cultural purposes; or (ii) legally protected cultural heritage areas, including those proposed by host governments for such designation.

⁷²⁹ *Idem*, PS8, paragraph 10, p. 2.

⁷³⁰ *Idem*, Performance Standard 8, footnote to paragraph 11, p. 2.

⁷³¹ *Idem*, Performance Standard 8, paragraph 11, p. 2-3.

⁷³² *Idem*, Performance Standard 8, paragraph 12, p. 3.

In principle, IFC clients should not remove, significantly alter, or damage critical cultural heritage. Exceptionally, if this is not possible, clients should resort to a process of ICP, in good faith, and resorting to external experts. If a project is located in a legally protected cultural heritage area, such as world heritage sites and nationally protected areas, clients are required to respect the conditions for permanent removal of non-replicable cultural heritage. In addition, clients should: (1) comply with defined national or local cultural heritage regulations or the protected area management plans; (2) consult the protected area sponsors and managers, local communities and other key stakeholders on the proposed project; and, finally, (3) implement additional programs, as appropriate, to promote and enhance the conservation aims of the protected area.⁷³³

To finalise the assessment of the relevant IFC PSs, it is important to note that there has been considerable progress from the 2006 to the 2012 version, in particular, and as mentioned above, in terms of requiring the FPIC of indigenous peoples in certain situations, as well as including gender considerations. Although the IFC's primary concern is, of course, the financial viability of projects, it has been progressively more and more concerned with the adverse impacts these projects can cause. Not only is this significant because of the very high volume of projects financed by the IFC, but also because of the influence it can exert on other financial institutions, as will be seen in the next section.

3. Private Sector Banks and Human Rights

The UN Guiding Principles, analysed in the previous chapter and above in Section 1, establish a responsibility to respect human rights that applies to all businesses, including banks. Perhaps not surprisingly, there has been a tendency in recent years for commercial banks to incorporate such responsibility in their activities through a number of mechanisms, as a response to increasing external and internal pressure. In the words of Forster et al., '[o]ne of the most striking phenomena of recent years has been the emergence, in a depressed international market, of a willingness, even in some cases an eagerness, among commercial organisations to have regard to the social and environmental impact of their activities.'⁷³⁴ Banks are not an exception to

⁷³³ *Idem*, Performance Standard 8, paragraph 15, p. 3.

⁷³⁴ Malcolm Forster et al. (2005), p. 217.

this willingness, as will be seen through the analysis of two particularly relevant voluntary initiatives: the Equator Principles and the Thun Group of Banks.

3.1. The Equator Principles

The impact that financial institutions can have on the environment and human rights is evident, and so is the idea that banks have the capacity to influence the global economy, the environment and social structures through their investment decisions and risk management solutions.⁷³⁵ This is particularly acute in cases where commercial banks fund large projects in sectors such as infrastructure, mining and oil and gas, which is usually done through project finance. The particularity of project finance resides in the fact that the repayment of the project finance loan essentially relies on the cash flow of the Special Purpose Entity (SPE) and on the value of its assets, rather than on the assets of the project sponsors. Project finance is ‘mainly used to finance capital-intensive assets and facilitate risk dispersion with complex projects.’⁷³⁶ On the other hand, as Adeyemi highlights, [o]wing to the limited recourse nature of the project finance loan, banks have a stake in the SPE’s financial performance [which] provides financial and reputational incentive to the bank to ensure that social and environmental risk of the proposed project is considered and lessened where appropriate’.⁷³⁷

Project finance has been resorted to for centuries and was especially important, for instance, in the British industrialisation process, during the late 18th century. However, the development of the modern project finance model occurred in the 1930s, with the ‘New Deal’ in the US, for the financing of infrastructure and resource projects. The involvement of private sector banks in this type of lending grew exponentially since the early 1990s, when many State-owned companies were privatised.⁷³⁸ This growth

⁷³⁵ Christopher Wright, ‘Global banks, the environment, and human rights: The impact of the Equator Principles on lending policies and practices’, 12 *Global Environmental Politics* 56 (2012), p. 57.

⁷³⁶ Michael Regan et al., ‘Project finance for public private partnerships: Evidence from Australia’ (2015) Proceedings of the 2nd International Conference on Public-Private Partnerships, Austin, Texas, USA, available at:

https://www.researchgate.net/profile/Peter_Love2/publication/281075559_Project_Finance_for_Public_Private_Partnerships_Evidence_from_Australia/links/55d3e68f08ae7fb244f590b9.pdf, p. 2.

⁷³⁷ Adebola Adeyemi (2014), p. 99.

⁷³⁸ Michael Regan et al. (2015), pp. 1-2.

is also attributed to deregulation and globalisation, which contributed to the increasing use of project finance both in developed and developing countries.⁷³⁹

In project finance, banks may provide loans singularly or in conjunction with other commercial banks or MDBs such as the IFC. The most prominent advantage of the involvement of MDBs in project finance lies in the fact that political risk can be more effectively mitigated,⁷⁴⁰ but also in the fact that sustainability efforts advanced at MDB level permeate and influence private sector banks.

Project finance entails a number of risks, which may be commercial (such as currency fluctuations or changes in demand) or non-commercial (political, fiscal and regulatory). One of the most prominent problems associated with project finance lies in the fact that it may compromise host States' ability to regulate on non-economic matters, such as the protection of human rights. This danger is particularly severe when the agreements entered into to comply with lenders' requirements contain stabilisation clauses, which are meant to ensure that host States do not change the regulatory framework in a way that alters the economic equilibrium of the project and is detrimental to the foreign investor.⁷⁴¹ Because project finance 'heavily relies on projected cash flows, sponsors and lenders typically seek higher levels of stability than those provided by general international law.'⁷⁴²

In light of the above, it is important to understand how the negative impacts of project finance can be tackled, and to analyse one of the most important private sector initiatives in this regard: the Equator Principles (EP).

a) Origins, concept and scope of the Equator Principles

The EP were born out of continued pressure, both external and internal, on private sector financial institutions to effectively act in accordance with their CSR

⁷³⁹ Annie Dufey and Maryanne Grieg-Gran, 'The linkages between project finance and sustainable development' in Sheldon Leader and David Ong (eds), *Global project finance, human rights and sustainable development* (Cambridge University Press 2011), p. 17.

⁷⁴⁰ Adebola Adeyemi (2014), p. 100.

⁷⁴¹ Lorenzo Cotula, 'Freezing the balancing act? Project finance, legal tools to manage regulatory risk, and sustainable development' in Sheldon Leader and David Ong (eds), *Global project finance, human rights and sustainable development* (Cambridge University Press 2011), pp. 142-143.

⁷⁴² *Idem*, p. 147.

commitments.⁷⁴³ In October 2002, ABN AMRO and the IFC called a meeting in London with a small number of prominent commercial banks, with the purpose of discussing the social and environmental impacts of project finance.⁷⁴⁴ During the following year, the participants decided to address such impacts through the development of a risk management framework, and began drafting a set of principles and standards. Concomitantly, at the World Economic Forum in Davos in January 2003, 102 NGOs drafted, signed and released the Collevocchio Declaration,⁷⁴⁵ which 'demanded that financial institutions formulate clear sustainability objectives, introduce and enforce environmental and social compliance requirements, support debt-relief for highly-indebted developing countries, refrain from financing projects without local community consent, disclose policies and lending portfolios, and lobby in favor of stronger financial regulation.'⁷⁴⁶

In June 2003, the group of banks announced in Washington DC that they were launching the first version of the EP, based on standards adopted by the WB and the IFC. The EP were subsequently revised in 2006 and again in 2013, so as to bring its provisions in line with the revised standards of the WB and the IFC. These revisions extended the Principles in number and scope, and reflected proposals presented by NGOs and civil society as to how they could be made more effective; this resulted in increased control over project activity by the EP financial institutions (EPFIs).⁷⁴⁷ Today, the EP count with the adherence of 89 financial institutions in 37 countries, which amounts to 'over 70 percent of international Project Finance debt in emerging markets.'⁷⁴⁸ Its main commitments are expressed as follows:

We, the Equator Principles Financial Institutions (EPFIs), have adopted the Equator Principles in order to ensure that the Projects we finance and advise on are developed in a manner that is socially responsible and reflects sound environmental management practices. We recognise the importance of climate change, biodiversity, and human rights, and believe negative impacts

⁷⁴³ Ryan Christopher Hansen, 'The Impact of the Equator Principles on Lender Liability: Risks of Responsible Lending' (2006), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=948228, p. 4.

⁷⁴⁴ Malcolm Forster et al. (2005), p. 218.

⁷⁴⁵ Available at:

http://www.banktrack.org/download/collevecchio_declaration/030401_collevecchio_declaration_with_signatories.pdf.

⁷⁴⁶ Christopher Wright (2012), p. 59.

⁷⁴⁷ Ryan Christopher Hansen (2006), p. 5.

⁷⁴⁸ See the 'About the Equator Principles' section in the EP website, at: <http://www.equator-principles.com/index.php/about>.

on project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable they should be minimised, mitigated, and/or offset. (...)

*We will not provide Project Finance or Project-Related Corporate Loans to Projects where the client will not, or is unable to, comply with the Equator Principles.*⁷⁴⁹

As Adeyemi points out, the EPFIs willingness to decrease potential profits, expressed through the pledge not to provide services to clients who do not respect the EP, reveals the ‘depth of financier commitment’ of the EPFIs.⁷⁵⁰ Even though the adoption of the EP is voluntary and allows for considerable flexibility, it is crucial to observe that the majority of signatories ‘are now able to show a significant level of adoption of the EPs within their lending criteria and practice.’⁷⁵¹ Dowell-Jones further affirms that the EPFIs have been assuming the function of watchdogs, since they monitor borrowers’ safeguard strategies so as to ensure that they cover social and environmental impacts in a satisfactory way.⁷⁵²

Another important point made in the Preamble to the EP is the fact that they constitute a ‘common baseline and framework’, to be implemented by each of the EPFIs through their internal environmental and social policies, procedures and standards.⁷⁵³ Consequently, EPFIs have substantial room to choose how to implement the EPs:

*This flexible approach has helped speed adoption of the Principles because each EPFI retains the discretion to fashion policies and procedures tailored to their organization and the particular project under review, including whether deviations from IFC or World Bank guidelines are warranted. Instead of resisting a rigid external system, EPFIs invest ownership in “their” social and environmental standards, integrating sustainable development practices in line with the Principles at a level and pace that best fits their organizational profile.*⁷⁵⁴

In terms of scope, the EP were considerably expanded in the 2013 revision process. Before this revision, the Principles only applied to project financings over US\$10

⁷⁴⁹ Equator Principles (June 2013), Preamble, p. 2 (emphasis added).

⁷⁵⁰ Adebola Adeyemi (2014), p. 101.

⁷⁵¹ *Idem*, p. 102.

⁷⁵² Mary Dowell-Jones (2013), p. 438-439.

⁷⁵³ Adebola Adeyemi (2014), p. 102.

⁷⁵⁴ Ryan Christopher Hansen (2006), pp. 5-6.

million; the established threshold was a cause for concern, as NGOs quickly pointed out, since it was believed that projects causing severe adverse social and environmental impacts were being disguised as corporate loans, so as to avoid the application of the EP.⁷⁵⁵ As a result of the latest revision, the EP now apply to a larger number of projects and advisory services. The EP apply ‘globally and to all industry sectors’, and to the following financial products: (1) *project finance advisory services* where total project capital costs are US\$10 million or more; (2) *project finance* with total Project capital costs of US\$10 million or more; (3) *project-related corporate loans* (including export finance in the form of buyer credit), if conditions are met (the majority of the loan relates to a single project over which clients have effective direct or indirect operational control, the total aggregate loan amount is at least US\$100 million, the EPFI’s individual commitment is at least US\$50 million, and the loan tenor is at least two years); and (4) *bridge loans* with a tenor of less than two years that are intended to be refinanced by project finance or a project-related corporate loan that is anticipated to meet the four conditions established in number (3).⁷⁵⁶

Furthermore, the EP will apply to the expansion or upgrade of existing projects where changes in scale or scope have the potential to create significant adverse risks and impacts, or significantly change the nature or degree of an existing impact.⁷⁵⁷

It should be noted that, although the EP apply in both developed and developing countries, the former most commonly have laws and regulations that make compliance with most elements of the risk management framework mandatory. Very differently, most developing countries do not have a strong legal and regulatory framework and, therefore, the EP ‘call on EPFIs to “over-comply” by following stringent standards despite the absence of a legal requirement to do so.’⁷⁵⁸

b) The content of the Equator Principles

The EP contain ten principles, covering: review and categorisation; environmental and social assessment; applicable environmental and social standards; environmental and social management systems and EP action plan; stakeholder

⁷⁵⁵ Michael Torrance, ‘*Equator Principles III: new sustainability rules requiring legal strategy rethink*’, 8 Journal of International Banking and Financial Law 503 (2013), p. 503.

⁷⁵⁶ Equator Principles (June 2013), Scope, p. 3.

⁷⁵⁷ *Ibidem*.

⁷⁵⁸ Christopher Wright (2012), p. 59.

engagement; grievance mechanisms; independent review; covenants; independent monitoring and reporting; and reporting and transparency.

One of the main aspects of the EP is the categorisation of project proposals, in accordance with the degree and nature of the environmental and social risks and impacts they are likely to entail. This categorisation is to be done in line with the IFC's environmental and social categorisation process, which was described in section 2 above. Principle 1 of the EP, regarding review and categorisation, requires banks to screen projects as a part of the internal environmental and social review and due diligence process, taking into account the nature, scale and stage of the project, as well as the level of environmental and social risks and impacts. Projects are thus categorised as 'category A' if they are high-risk, 'category B' if they are medium-risk, and 'category C' if they are low-risk.⁷⁵⁹ In the words of Torrance, '[c]ategorisation of projects is a highly discretionary and inexact process (...) [and it] will typically be reviewed at least annually or whenever changes to the project occur that could affect the level of environmental and social risk of a project'.⁷⁶⁰ Because categorisation occurs at a very early stage, as soon as a project is proposed, there is still the possibility of correcting courses of action and ensuring that issues regarding the sustainability of a project are identified and addressed before financing actually takes place.⁷⁶¹

The categorisation process is essential, since placing a project under a specific category determines which actions should be taken by both the EPFIs and their clients. In very general terms, category A projects require extensive due diligence to be conducted by both the EPFI and the borrower, whilst categories B and C entail decreasingly stringent obligations. Obviously, the more stringent the due diligence requirements, the more expensive it will be for both the EPFIs and their clients; therefore, NGOs have consistently expressed concerns as to the possibility that EPFIs will categorise projects as B when they should be placed in category A, or as C when they belong to category B, so as to reduce due diligence costs.⁷⁶²

Principles 2 and 3 constitute an effort to minimise reputational and financial risks by 'designating the form and substance of the sustainability enquiry'.⁷⁶³ Starting with

⁷⁵⁹ Equator Principles (June 2013), Statement of Principles, p. 5.

⁷⁶⁰ Michael Torrance (2013), p. 503.

⁷⁶¹ Ryan Christopher Hansen (2006), p. 9.

⁷⁶² *Ibidem*; see also Malcolm Forster et al. (2005), p. 254.

⁷⁶³ *Idem*, p. 11.

form, Principle 2 states that borrowers are required to conduct an Environmental and Social Assessment for all category A and B projects. The assessment of project proposals may include a number of issues, such as, *inter alia*, human rights, land acquisition and involuntary resettlement, impacts on indigenous peoples and their unique cultural systems and values, and protection of cultural property and heritage.⁷⁶⁴ The assessment documentation should include measures to minimise, mitigate, and offset adverse impacts, and it should contain an adequate, accurate and objective evaluation and presentation of all identified risks and impacts. More importantly, for category A projects, and, as appropriate, for category B projects, borrowers are required to undertake an ESIA; in addition, in some high-risk situations, borrowers are expected to add a human rights due diligence process, or other focused assessment, to their documentation.⁷⁶⁵

Regarding the substance of the sustainability inquiry, Principle 3 emphasises the need for borrowers to comply with all relevant host State laws, regulations and permits regarding environmental and social issues. For that purpose, this Principle further makes a distinction between ‘designated countries’ (i.e., countries which are ‘deemed to have robust environmental and social governance, legislation systems and institutional capacity designed to protect their people and the natural environment’,⁷⁶⁶ such as several EU member States, Australia, the US and others)⁷⁶⁷ and ‘non-designated countries’ (all others). For projects located in designated countries, the assessment process will evaluate compliance with host State laws and regulations, whereas for projects located in non-designated countries, the assessment process will evaluate compliance with the applicable IFC PSs and the World Bank Group EHS Guidelines. Importantly the relevant standards (either host State laws and regulations, or IFC PSs/WB EHS Guidelines) constitute a minimum threshold, and EPFIs may, at their sole discretion, apply additional requirements.⁷⁶⁸

Principle 4 establishes the need for borrowers to develop or maintain an ESMS, in line with the IFC PSs. In order to comply with this Principle, clients are required to prepare an Environmental and Social Management Plan (ESMP) in order to address the issues raised in the assessment phase, incorporating actions that are necessary

⁷⁶⁴ Equator Principles (June 2013), Exhibit II, p. 20.

⁷⁶⁵ Equator Principles (June 2013), Statement of Principles, pp. 5-6.

⁷⁶⁶ *Idem*, Exhibit I, p. 15.

⁷⁶⁷ A complete list of designated countries is available at:
<http://www.equator-principles.com/index.php/ep3/designated-countries>.

⁷⁶⁸ Equator Principles (June 2013), Statement of Principles, p. 6.

to ensure compliance with the relevant standards. If these are not fully complied with, EPFIs should agree with their clients an Equator Principles Action Plan (AP), which has the purpose of bringing the project back in line with the relevant standards.⁷⁶⁹

Principle 5 outlines consultation and disclosure measures to be implemented by borrowers. For all category A and B projects, clients are required to engage with the relevant stakeholders ‘in a structured and culturally appropriate manner’. Where severe adverse impacts are anticipated, clients should furthermore conduct a free ICP process, tailored to ‘the risks and impacts of the Project; the Project’s phase of development; the language preferences of the Affected Communities; their decision-making processes; and the needs of disadvantaged and vulnerable groups.’ In addition, clients are required to make available to the relevant stakeholders all pertinent assessment documentation, preferably in the local language and in a culturally appropriate manner, continuously and starting before construction begins. The results from the stakeholder engagement process, as well as any actions determined through it, should be adequately documented. It is interesting to note that Principle 5 addresses the specificity of the situation of indigenous peoples; in fact, this Principle requires both ICP and FPIC, in accordance with the criteria established in the IFC PS7.⁷⁷⁰

Principle 6, on the other hand, states that EPFIs will require their clients to establish grievance mechanisms, as a part of the ESMS, for all category A and, as appropriate, category B projects. The grievance mechanism has the purpose of receiving and facilitating resolution of concerns and grievances about the project’s environmental and social performance. Additionally, it should be scaled in accordance with the risks and impacts of each project, and have the relevant stakeholders (who will be informed of this mechanism during the stakeholder engagement process) as its primary user. The grievance mechanism will ‘seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate, readily accessible, at no cost, and without retribution to the party that originated the issue or concern (...) [and it] should not impede access to judicial or administrative remedies.’⁷⁷¹

As Hansen correctly observes,

⁷⁶⁹ *Idem*, Statement of Principles, p. 7.

⁷⁷⁰ *Ibidem*.

⁷⁷¹ *Idem*, Statement of Principles, p. 8.

Principles 7, 8 and 9 aim to secure objectivity and accountability throughout the life of the project. Principles 7 and 9 bring objectivity to the due diligence, project monitoring and reporting processes by requiring independent expert review, while 8 makes the borrower accountable by tying various loan covenants to Principles compliance. Because the three Principles collectively place EPFI's in position to "sign-off" on a project's conformity with the applicable social and environmental standards or to exercise remedies when they are breached, they are likely to be the key conduits for holding EPFI's liable for a project's social or environmental harms. How they are implemented is thus of central importance to assessing EPFI liability risk.⁷⁷²

Principle 7 distinguishes between project finance and project-related corporate loans. In the first case, an independent environmental and social consultant will carry out an independent review of the assessment documentation including the ESMPs, the ESMS, and the stakeholder engagement process documentation. The independent consultant will furthermore propose an adequate AP to bring the project into compliance with the EP or advise when compliance is not possible. This will assist EPFIs in the due diligence process and establish compliance before the approval of financing. Independent expert reviews are also important because they 'should help alleviate NGO concerns that EPFIs will be inclined to rubber stamp a lax borrower due diligence effort in order to maintain a profitable business relationship'.⁷⁷³

In the case of project-related corporate loans, and for projects with potential high-risk impacts, the independent consultant will conduct a review on issues such as adverse impacts on indigenous peoples, critical habitat impacts, significant cultural heritage impacts and large-scale resettlement. For all other category A, and as appropriate category B, project-related corporate loans, the EPFI may be satisfied with an internal review, which may take into account due diligence efforts undertaken by a MDB.⁷⁷⁴

Principle 8 is extremely important, in that it allows EPFIs to exercise a higher level of control over clients' compliance with the EP. This Principle establishes that, for all projects, borrowers should covenant to comply with all relevant host country environmental and social laws, regulations and permits in all material respects. In addition, for category A and category B projects, clients will covenant to: (1) comply

⁷⁷² Ryan Christopher Hansen (2006), pp. 14-15 (emphasis added).

⁷⁷³ *Idem*, p. 15.

⁷⁷⁴ Equator Principles (June 2013), Statement of Principles, pp. 8-9.

with the ESMPs and AP (where applicable) during the construction and operation of the project in all material respects; (2) periodically report on compliance with the ESMPs and AP (where applicable), as well as on compliance with relevant local, state and host country environmental and social laws, regulations and permits; and (3) decommission the facilities in accordance with an agreed decommissioning plan, where appropriate. The most important part of this Principle lies in the possibility for EPFIs to work with the borrower on remedial actions to bring the project back into compliance, as well as to exercise remedies in case the borrower fails to re-establish compliance within a given grace period.⁷⁷⁵

Principle 9 contributes to the determination of whether borrowers have complied with their commitments. In cases of project finance within category A and, as appropriate, category B, the EPFIs will require the appointment of an independent environmental and social consultant, or require that the client retain qualified and experienced external experts to verify its monitoring information. In the case of project-related corporate loans, and if an independent review is required under Principle 7, borrowers are required to appoint an independent environmental and social consultant after financial close (i.e., whenever all conditions precedent to initial drawing of the debt have been satisfied or waived)⁷⁷⁶ or require that the client retain qualified and experienced external experts to verify its monitoring information.⁷⁷⁷

Lastly, Principle 10 represents an effort to increase transparency and enhance reporting. In addition to the disclosure requirements established in Principle 5, clients are required to disclose (for projects in category A and, as appropriate, category B) a summary of the ESIA and publicly report greenhouse gas emission levels in some cases. EPFIs are required to disclose, at least annually, which transactions have reached financial close, as well as its EP implementation processes and experience, taking into account appropriate confidentiality considerations. Annex B provides more detailed minimum reporting requirements.⁷⁷⁸

To finalise this overview of the EP, it is crucial to mention that, in spite of the fast growth of the initiative, there are still several important financial institutions (including public ones) that have significant involvement in project finance, but have not adopted

⁷⁷⁵ Equator Principles (June 2013), Statement of Principles, p. 9.

⁷⁷⁶ *Idem*, Exhibit I, p. 17.

⁷⁷⁷ *Idem*, Statement of Principles, p. 10.

⁷⁷⁸ *Idem*, Statement of Principles, pp. 10-11; see also Annex B, pp. 13-14.

the EP.⁷⁷⁹ Nevertheless, there is a 'growing belief among the Equator Banks that a virtuous circle is beginning to develop whereby sponsors, aware of the stringent requirements of the Principles, are bringing more robustly assessed projects to the Equator Banks.'⁷⁸⁰

One of the most prevalent criticisms to the EP resides in its lack of accountability and transparency, resulting from the absence of a dispute resolution mechanism such as the IFC CAO. In fact, if EPFIs fail to implement the standards contained in the EP, affected communities do not have access to monitoring mechanisms.⁷⁸¹ In addition, because EPFIs have confidentiality obligations in relation to their clients, there are many aspects of projects which are never disclosed. Whilst in some States there is legislation prohibiting disclosure of confidential information, it is worth noting that the EPFIs have been making an effort to increase transparency.⁷⁸² According to Wright, '[a]ssessing the impact of the Equator Principles on the selection, preparation and substantive outcomes of projects is made difficult by the virtual absence of public information about the terms and conditions of individual project finance transactions.'⁷⁸³ In addition,

*The EPs, in their current state, cover only a small portion of banking services relating to project finance (indeed some banks are not involved in project finance at all so operate outside the scope of the EPs). Therefore, banks who consider that implementing the EPs alone will address their human rights impacts are likely to overlook significant impacts to which they are linked through their other products and services.'*⁷⁸⁴

In July 2010, a 'de-listing' mechanism was introduced into the EP for cases where EPFIs do not pay the annual fee to the Secretariat or fail to comply with reporting

⁷⁷⁹ Christopher Wright (2012), p. 62.

⁷⁸⁰ Malcolm Forster et al. (2005), p. 9.

⁷⁸¹ Malcolm Forster et al., 'The Equator Principles - Making a Difference? Part 2', 7 Journal of International Banking and Financial Law 253 (2005), p. 4.

⁷⁸² *Idem*, p. 5.

⁷⁸³ Christopher Wright (2012), p. 64.

⁷⁸⁴ UNEP Finance Initiative and Foley Hoag LLP (December 2015), p. 50.

requirements;⁷⁸⁵ it is very unfortunate that the ‘de-listing’ mechanism does not apply to implementation failures.⁷⁸⁶

Finally, it should be noted that, even though human rights have been an important part of the EP since inception, the 2013 version ‘make[s] an explicit commitment to a broader scope of rights’ and requires EPFIs to conduct due diligence processes in line with the UN Guiding Principles and the IFC PSs, as well as additional human rights due diligence in high-risk areas.⁷⁸⁷

3.2. The Thun Group of Banks

In 2011, four European Banks (Barclays, Credit Suisse, UBS and UniCredit) launched the Thun Group, an informal group named after the Swiss town where the group met for the two initial workshops. The goal of this group was to discuss the meaning and implications of the UN ‘Protect, Respect and Remedy Framework’ and the Guiding Principles for the activities of banks. The group does not constitute a formal entity, but gathers banks that have a genuine interest in the relationship between human rights and financial institutions.⁷⁸⁸ The Thun Group recognises in their initial statement that:

The “Guiding Principles” bring a welcome profile and degree of clarity to the human rights and business agenda. They provide a blueprint for companies to show that they respect human rights, and reduce the risk of causing or contributing to human rights abuses. At the same time, they do not – nor do they intend to – provide specific guidance for each industrial sector. Further interpretation work is required to understand how the “Guiding Principles”

⁷⁸⁵ The Equator Principles Association, ‘Governance Rules’ (2016), available at: http://www.equator-principles.com/resources/governance_rules.pdf, pp. 10 and 23. The EP Association ‘is the unincorporated association of member [EPFIs] whose object is the management, administration and development of the EPs’; the Secretariat ‘manages the day to day running of the EP Association and provides a wide variety of services to the EP Association members, Steering Committee and Chair.’ – see:

<http://www.equator-principles.com/index.php/about-ep/governance-and-management> and <http://www.equator-principles.com/index.php/the-secretariat>.

⁷⁸⁶ Christopher Wright (2012), p. 68.

⁷⁸⁷ UNEP Finance Initiative and Foley Hoag LLP (December 2015), pp. 49-50.

⁷⁸⁸ The Thun Group of Banks, ‘Statement by the Thun Group of banks on the “Guiding principles for the implementation of the United Nations ‘protect, respect and remedy’ framework” on human rights’ (2011), available at: <https://business-humanrights.org/sites/default/files/media/documents/thun-group-of-banks-statement-guiding-principles-19-oct-2011.pdf>, p. 3.

*should be implemented within specific industries, including the banking sector.*⁷⁸⁹

With the above in mind, the group decided to develop ‘a practical application guide’ comprising the challenges and best practice examples of implementing the Guiding Principles in bank activity.⁷⁹⁰ According to the 2013 Discussion Paper, which was signed by seven banks,⁷⁹¹ the work of the Thun Group is motivated by three drivers: (1) acting responsibly (respecting human rights as ‘the right thing to do’ and an integral part of responsible business conduct); (2) acting instead of waiting for legal requirements (accepting business responsibility for human rights even in jurisdictions that have not adopted legislation to tackle the issue); and (3) acting jointly (taking the opportunity to combine efforts in the process of operationalising the Guiding Principles).⁷⁹²

One of the main ideas behind the work of the Thun Group is the recognition of the Guiding Principles as ‘law in the making’, i.e., as ‘a good example of “hardening” soft law in the sense that they act as a catalyst to spark new policy requirements or binding regulation and are being multiplied by other international organisations and national legislators.’⁷⁹³

For the purposes of this chapter, it is important to briefly consider the most relevant points addressed in the 2013 Discussion Paper. Firstly, the Thun Group suggests that banks should develop ‘a risk management model that goes beyond traditional parameters, to address (identify, manage and mitigate) human rights risks to external stakeholders, i.e., which identifies and assesses potential adverse impacts on rights holders as well as risks to the bank itself.’ This risk management model should ensure ‘awareness of human rights issues and responsibilities within the bank at all levels and across all disciplines.’⁷⁹⁴

⁷⁸⁹ The Thun Group of Banks (2011).

⁷⁹⁰ Banktrack, ‘On the Thun Group Paper on Banks and Human Rights’ (2013), available at: http://www.banktrack.org/download/banktrack_on_the_thun_group_paper_on_banks_and_human_rights/banktrack_thun_group_paper_131119_0.pdf, p.1.

⁷⁹¹ Barclays, BBVA, Credit Suisse AG, ING Bank N.V., RBS Group, UBS AG and UniCredit; see The Thun Group of Banks, ‘Statement by the Thun Group of Banks - “The Guiding Principles: an interpretation for banks”, A Discussion Paper for banks on Principles 16 – 21 of the UN Guiding Principles on Business and Human Rights’ (2013) (hereinafter, the ‘2013 Discussion Paper’, available at: https://business-humanrights.org/sites/default/files/media/documents/thun_group_statement_final_2_oct_2013.pdf.

⁷⁹² The Thun Group of Banks, ‘2013 Discussion Paper’, p. 3.

⁷⁹³ *Idem*, p. 4.

⁷⁹⁴ The Thun Group of Banks, ‘2013 Discussion Paper’, p. 5.

The 2013 Discussion Paper recognises that '[a] "one-size fits all" approach to due diligence will not be feasible across the many relationships, transactions and activities of a multi-national bank', and also that '[i]t is not practical to undertake a full human rights assessment of every business arrangement. An initial assessment should identify whether there is a potential for low, medium or high risk of human rights impacts, and further due diligence should be tailored to mitigate those risks.'⁷⁹⁵ Amongst the factors that trigger the requirement of an enhanced due diligence process, the Discussion Paper mentions the examples of financing projects in conflict zones, providing financial services to a sector with strong human rights sensitivities and developing financial products associated with vulnerable client segments.⁷⁹⁶ The 2013 Discussion Paper further states that '[t]he need for a heightened level of due diligence will increase in the presence of international sanctions, high levels of corruption, political instability, violent repression of minority groups or dissidents, armed conflict, undemocratic government, poverty, discrimination, or weak governance.'⁷⁹⁷

The document also recognises that due diligence efforts will be more effective in situations where the bank has a high level of leverage, and that '[w]here a transaction entails little leverage and no ongoing relationship, the capacity for engagement with the client is likely to be very limited. In such cases, it may be that an in principle decision to approve or decline the relationship is taken as there is little or no opportunity to address any impacts and risks identified. Leverage is therefore a material factor in considering the potential for human rights impact and risk mitigation.'⁷⁹⁸

The 2013 Discussion Paper was praised by commentators and NGOs as representing 'a critical juncture on the way to delineate the human rights responsibilities of the financial sector'.⁷⁹⁹ Nevertheless, Banktrack pointed out a number of weaknesses, namely: (1) lack of engagement with civil society and other stakeholders; (2) the 'context' section is weak and underplays banks' influence; (3) the Discussion Paper only partially covers the Guiding Principles; (4) it does not

⁷⁹⁵ *Idem*, p. 9.

⁷⁹⁶ *Ibidem*.

⁷⁹⁷ *Idem*, p. 10.

⁷⁹⁸ *Ibidem*.

⁷⁹⁹ Damiano De Felice, 'Banks and human rights due diligence: A critical analysis of the Thun Group's discussion paper on the UN Guiding Principles on Business and Human Rights', 19 *The International Journal of Human Rights* 319 (2015), p. 321.

address bank responsibility to ensure Access to Remedy; and (5) the human rights due diligence in general corporate loans is almost exclusively based on information provided by the client and loses the focus on rights-holders.⁸⁰⁰

In addition, authors criticised the fact that the approach of the Thun Group in 2013 expressed a ‘subsidiary approach’, i.e., the idea that banks can only commit human rights violations indirectly, through the actions of their clients, and not directly through their activities,⁸⁰¹ even though it is commonly understood that ‘the global financial system and financial institutions are in practice a separate system that is much bigger than the underlying world economy that has profound and far reaching human rights impacts of its own’.⁸⁰² This issue was addressed in the beginning of 2017, when the Thun Group issued another Discussion Paper, this time focusing on Guiding Principles 13 and 17.⁸⁰³ This new document explicitly acknowledges that ‘banks can be directly linked to adverse human rights impacts through the provision of their financial products and services’⁸⁰⁴ and provides guidance on the degree of proximity between the bank and the human rights impact.⁸⁰⁵

After the 2013 Discussion Paper, the Thun Group was further criticised for not devoting much attention to the mitigation of human rights impacts, since the document only mentioned that ‘[t]he mitigation measures that a bank can put in place will depend on the type of financial products or services as well as on the nature of the business relationship with the client.’⁸⁰⁶ This concern was also addressed in the 2017 Discussion Paper, which now devotes an entire section to due diligence and mitigation measures.⁸⁰⁷ As it stands today, the guidance provided by the Thun Group of Banks is of great importance, since it ‘lays the foundations for the adoption of the

⁸⁰⁰ Banktrack (2013), pp. 2-5.

⁸⁰¹ Damiano De Felice (2015), p. 325.

⁸⁰² Mary Dowell-Jones (2013), p. 436.

⁸⁰³ The Thun Group of Banks, Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context (2017) (hereinafter, ‘2017 Discussion Paper’).

⁸⁰⁴ *Idem*, p. 6.

⁸⁰⁵ *Idem*, pp. 7-9.

⁸⁰⁶ The Thun Group of Banks, ‘2013 Discussion Paper’, p. 14.

⁸⁰⁷ The Thun Group of Banks, ‘2017 Discussion Paper’, pp. 10-12 and p. 14. This document was highly criticised for not accurately reflecting the content of the Guiding Principles – see John Ruggie, *Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context* (2017), available at: <https://business-humanrights.org/sites/default/files/documents/Thun%20Final.pdf>. The group’s response is available at: https://business-humanrights.org/sites/default/files/2017_02_28_Thun%20Group_response_John%20Ruggie.pdf.

first ever comprehensive guide on how universal banks should operationalise their responsibility to respect human rights.⁸⁰⁸

4. Conclusions

Over the past decades, interest on the relationship between banks and human rights has grown exponentially, giving rise to heightened pressure over financial institutions and, consequently, the adoption of a number of instruments and solutions meant to allow for the identification, management and mitigation of human rights impacts. Research on the issue has started to proliferate, and international organisations reflected this tendency by taking initiatives such as the UNEP FI Human Rights Guidance Tool for the Financial Sector⁸⁰⁹ and panel discussions focusing on the banking and financial sectors under the auspices of the UN Global Compact.⁸¹⁰

Although the instruments assessed in this chapter are not legally binding and thus constitute soft law, there has been an increasing tendency for the principles that they express to ‘harden’. In the case of the World Bank Group, commentators have made suggestions along the lines of Bradlow et al., who affirm:

*The three processes surrounding the operational policies of the World Bank and the IFC (...) — rule-making, rule-application and rule-enforcement — are becoming more ‘law-like’ (with ‘law’ being conceptualized within the broader theoretical parameters of global administrative law, functionalist international constitutionalism and legal constructivism) and have been instrumental in changing the World Bank and IFC into ‘lawmaking’ and ‘law-governed’ institutions.*⁸¹¹

In fact, there are already several examples of States adopting binding legislation on the issue of banks and human rights and, in the EU, the Commission has urged

⁸⁰⁸ Damiano De Felice (2015), p. 330.

⁸⁰⁹ See <http://www.unepfi.org/humanrightstoolkit/>.

⁸¹⁰ See <https://www.unglobalcompact.org/take-action/events/231-promoting-integrity-and-transparency-in-the-banking-and-financial-sectors>.

⁸¹¹ Daniel D Bradlow and Andria Naudé Fourie, ‘The Operational Policies of the World Bank and the International Finance Corporation’, 10 International Organizations Law Review 3 (2013), p. 59.

Member States to develop National Action Plans⁸¹² to implement the UN Guiding Principles.⁸¹³

In light of the analysis undertaken above, it is now time to reflect on the question posed by this chapter: can banks make a difference in the way culture is respected within the context of foreign investment? It appears clear that they can. Firstly, there are several soft law instruments (progressively ‘hardening’) that explicitly declare that financial institutions have a human rights responsibility. Secondly, the human rights requirements of the most influential instruments (e.g., the IFC PSs, which provide the basis for the EP) provide for special protection of indigenous peoples (including their particular cultural life) and cultural heritage. Thirdly, it is evident that banks (including both MDBs and private banks) can and should use the leverage they hold over their clients in order to improve the sustainability of their performance.

In 2016, in the context of the protests at Standing Rock regarding the Dakota Access Pipeline, there was clear evidence that these mechanisms are not just theoretical possibilities or mere wishful thinking. In fact, the Norwegian bank DNB has announced that it has sold its assets in the project and is further considering pulling the loans it provided for the Dakota Access Pipeline.⁸¹⁴ In addition, several banks that, in spite of the pressure from civil society, are still funding the project, are allegedly ‘losing thousands of customers a week as a result’ of their involvement.⁸¹⁵

There is still much to be done in this respect, namely in terms of accountability – more initiatives should provide mechanisms through which affected stakeholders can raise concerns and affect the outcome of projects.⁸¹⁶ In addition, there should be more

⁸¹² See European Commission, Implementing the UN Guiding Principles on Business and Human Rights - State of Play: Commission Staff Working Document (SWD(2015)144 final) (2015).

⁸¹³ United Nations Environment Programme Finance Initiative and Foley Hoag LLP (December 2015), p. 53. This document also enumerates several legislative initiatives aimed at the implementation of soft law instruments on the subject of banks and human rights – see pp. 53-55.

⁸¹⁴ See, *inter alia*, Greenpeace (2016), *Largest Bank in Norway Sells Its Assets in Dakota Access Pipeline*, available at: <http://www.greenpeace.org/usa/news/largest-bank-norway-sells-assets-dakota-access-pipeline/>.

⁸¹⁵ See BankTrack (13 January 2017), *10 Banks financing Dakota Access Pipeline decline meeting with tribal leaders*, available at: http://www.banktrack.org/show/article/10_banks_financing_dakota_access_pipeline_decline_meeting_with_tribal_leaders.

⁸¹⁶ Several suggestions have already been made in this regard – see IISD Investment and Sustainable Development Program, ‘Investment-related Dispute Settlement - Towards an inclusive multilateral approach (Results from an IISD expert meeting held in Montreux, Switzerland, May 23–24, 2016)’ (2016), available at: <https://www.iisd.org/sites/default/files/publications/investment-related-dispute-settlement-montreux-expert-meeting.pdf>.

specific and detailed instructions for due diligence processes, so as to clearly include cultural rights. Overall, it appears that the international community is on the right track, calling for more accountability and supporting risk management frameworks that include human rights and cultural heritage. More needs to be done – but the foundations are already firmly set.

Chapter 6 – Investor-State dispute settlement and Cultural Rights

The last two chapters have discussed the ('hardening') soft law mechanisms that can be resorted to in order to ensure the protection of cultural rights. These mechanisms were found to be incredibly important developments, but imperfect solutions nonetheless. If the cultural rights of the stakeholders affected by a project cannot be protected *ex ante* and through the responsible behaviour of investors and lenders, there is (or there could be) one other tool to be harnessed: ISDS. Similarly to what was done in the previous chapters, the focus will be placed on the human rights impacts of international investment, with emphasis on the behaviour of the investor.

Ultimately, this chapter will explore how cultural rights can be (and have been) taken into account by investment tribunals, whilst discussing to what extent the affected communities are allowed to participate in the settlement of an investment dispute. It will attempt to demonstrate that the integration of HRL and investment through ISDS is possible and that it is occurring increasingly often, even if ISDS is not the ideal forum to deal with human rights issues.

In the introduction, I will build on the contents of Chapter 3, which discussed the interaction between IIL and cultural rights. Here, the approach will be more specific, clarifying the problematic relationship between ISDS and international HRL. Section 2 will identify the main entry points for HRL in ISDS, with a focus on denial of treaty protections, treaty interpretation, substantive standards, determination of the *quantum* of compensation and the possibility of counterclaims. Section 3 will explore the four main avenues for the consideration of human rights arguments in arbitral proceedings, namely the invocation of human rights arguments by the investor, the host State, third-parties and the tribunal itself. Finally, some conclusions will be drawn.

1. Introduction

The relationship between human rights and international investment has been hotly debated in literature and frequently addressed by civil society in recent years, in particular regarding ISDS. The growing popularity of investment arbitration as possibly the most effective way of resolving investment disputes (coupled with increasing recourse to the system by foreign investors),⁸¹⁷ has been accompanied by the emergence of new challenges, such as the interaction between IIL and non-economic goals, for example, the environment and sustainable development, which frequently have to be balanced in ISDS. Human rights issues can present in investment situations in several different ways, ranging from the interpretation of the actual rights and obligations of the investor, to States' exercise of regulatory power in order to comply with international obligations. However, there is a significant contrast between the importance given to the topic of investment and human rights by academics and activists and the actual treatment of the matter by arbitral tribunals⁸¹⁸ – so far, 'references to human rights in the domain of investment arbitration (...) remain sparse and infrequent' and 'the present role of human rights in the context of investment arbitration is peripheral at best.'⁸¹⁹

In this context, one might wonder if the problematic relationship between investment arbitration and human rights has been 'manufactured by legal academics and human rights activists'.⁸²⁰ As Karamanian rightly points out, there is no straightforward answer to this question, but it appears evident that, in many cases that do have human rights implications, the question is simply not raised in arbitral proceedings. According to this author, 'whether due to ignorance of the human rights arguments or in fear of the consequences if they are argued, the investors or states opt not to mention them.'⁸²¹ In addition, the atmosphere of confidentiality surrounding many investment disputes does not allow for an accurate account of human rights arguments raised in the proceedings, since many disputes remain completely

⁸¹⁷ See, inter alia, Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009), p. 46.

⁸¹⁸ In this sense, see Susan L Karamanian, 'The Place of Human Rights in Investor-State Arbitration', 17 *Lewis & Clark L Rev* 423 (2013), p. 426; see also UNCTAD, *Selected Recent Developments in IIA Arbitration and Human Rights* (UNCTAD/WEB/DIAE/IA/2009/7) (2009), p. 3.

⁸¹⁹ Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Arbitration' in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009), pp. 82-83.

⁸²⁰ Susan L Karamanian (2013), p. 426.

⁸²¹ *Idem*, p. 427.

unknown to the public – therefore, it is impossible to accurately say how many disputes involved human rights issues and how these were treated.⁸²²

Recent developments in IIA drafting techniques, which include specific mention to human rights in the treaty text and/or transparency and third-party participation requirements,⁸²³ coupled with a rising number of third-party involvement in investment disputes,⁸²⁴ have allowed for an increasingly relevant role for human rights in the context of foreign investment. The close relationship between these two areas is further demonstrated by the fact that regional human rights bodies, such as the ECtHR and the IACtHR, seem to be dealing with a mounting number of human rights disputes that are related to investment.⁸²⁵

The above notwithstanding, investment arbitration and international HRL appear to be worryingly disconnected, and one of the reasons that have been advanced for this lack of integration lies in the fact that IIAs are, in general, inherently imbalanced: investors are given a large number of rights, but mostly no obligations,⁸²⁶ and stakeholders are typically not even mentioned in either IIAs or investment contracts.⁸²⁷ The rights that foreign investors hold under IIAs are considered by many to be excessive, and potentially detrimental to a State's ability to regulate in the public interest.⁸²⁸ In this vein, some authors argue that MNEs have become more powerful than many States, which creates power imbalances that can have very negative impacts on the regulatory freedom of host States.⁸²⁹ However, whilst the imbalance between the power of investors and the power of States is a captivating subject, I am more interested in exploring the imbalance between the power of investors and the

⁸²² *Ibidem*.

⁸²³ See, for instance, references to the importance of human rights in the Preamble to the CETA; see also Articles 28 and 29 of the 2012 US Model BIT, which expressly establish transparency requirements and allow tribunals to accept *amicus curiae* submissions – available at: <http://www.state.gov/documents/organization/188371.pdf>.

⁸²⁴ In this sense, see Lucas Bastin, 'Amici Curiae in Investor-State Arbitration: Eight Recent Trends', 30 *Arbitration International* 125 (2014).

⁸²⁵ Vivian Kube and Ernst-Ulrich Petersmann, 'Human rights law in international investment arbitration', 11 *Asian J WTO & Int'l Health L & Pol'y* 65 (2016), p. 67.

⁸²⁶ Patrick Dumberry and Gabrielle Dumas-Aubin, 'When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration', 13 *The Journal of World Investment & Trade* 349 (2012), p. 349.

⁸²⁷ See Jan Wouters and Nicolas Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured', 3 *Hum Rts & Int'l Legal Discourse* 301 (2009), p. 302; see also UNCTAD (2009), p. 3.

⁸²⁸ George K Foster, 'Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties', 17 *Lewis & Clark Law Review* (2013), p. 366.

⁸²⁹ See Tai-Heng Cheng, 'Power, Authority and International Investment Law', 20 *American University International Law Review* 465 (2005), pp. 492-493.

power of stakeholders within the specific area of investment arbitration. Foster rightly points out that there is a worrying '(...) asymmetry between local stakeholders, on the one hand, and an effective alliance that sometimes exists between the investor and the host state, on the other',⁸³⁰ and this asymmetry must be addressed with care.

In this chapter, I will focus on ISDS, rather than on the more general issue of IIL and human rights, which would necessarily entail an in-depth analysis of IIAs – an analysis that, for reasons of space, will not be undertaken. It is therefore important to clarify certain fundamental aspects of investment arbitration before assessing how human rights issues have been dealt with by arbitrators.

Over the years, investment arbitration has consistently been seen as the preferred method of dispute resolution for reasons such as confidentiality, speed and cost-effectiveness, virtues which, however, 'have eroded with the expansion in the number of parties using arbitration, the increasingly adjudicative nature of the process and the shift in the group serving as arbitrators, which has grown beyond the "grand old men" to a younger generation of arbitration technocrats.'⁸³¹ This means that arbitration is often as expensive and lengthy as proceedings before national courts, which leads to the question of why investment arbitration should be chosen as a dispute settlement mechanism that has virtually lost its most prominent advantages. The answer, according to Franck, is neutrality:

First, there is neutrality of forum, where the place of dispute resolution does not unfairly benefit either party or create a "home court" advantage. One might call this international arbitration's function as a geographical half-way house. Second, there is the neutrality of the decision-making process. In other words, having arbitrators who are bound to and selected by the parties, but are nevertheless required to render decisions in an "independent" or "impartial" manner, offers adjudicative neutrality.⁸³²

Arbitrators are, first and foremost, international adjudicators who 'owe their powers to the consent of the litigant[s]'⁸³³ and ISDS 'is an adjudicatory process involving independent fact-finding and legal analysis according to rules of national and

⁸³⁰ George K Foster (2013), p. 368.

⁸³¹ Susan Franck, 'The Role of International Arbitrators', 12 ILSA J Int'l & Comp L 499 (2005), p. 500.

⁸³² *Idem*, p. 501 (references omitted, emphasis added).

⁸³³ Lon L Fuller and Kenneth I Winston, 'The forms and limits of adjudication', 92 Harvard Law Review 353 (1978), p. 354.

international law by neutral, independent, and impartial decision-makers.⁸³⁴ Because arbitral tribunals are not standing adjudicative bodies, their mandate is, in principle, case-specific;⁸³⁵ however, as affirmed by the tribunal in *Glamis Gold*, '[a] case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications.'⁸³⁶

A connected issue is that of the difference between law-applying and law-making functions. Whilst, in principle, arbitrators have the primary function of applying the law to the facts, it is also arguably their role to creatively contribute to the development of IIL, with impacts beyond the specific case.⁸³⁷ In this regard, it should be noted that, even though tribunals 'may not rule on questions that are not submitted to it or grant a remedy that is not requested of it (the *non ultra petita* principle), there is considerable support for the view that, in deciding on claims before it, a tribunal is not bound by the legal grounds and arguments advanced by the parties (the *jura novit curia* principle).'⁸³⁸

However, the above does not mean that investment arbitrators have the power to adjudicate matters that go beyond investment – and this issue is intimately linked with jurisdictional issues. The jurisdiction of arbitral tribunals depends on the consent of the parties, and it is limited by the scope of such consent. The clause establishing jurisdiction plays a key role in this regard, as it may be drafted in more restrictive or broader terms, either in IIAs or in investment contracts. Accordingly, in *Biloune v. Ghana*, the tribunal considered, based on the formulation of the jurisdictional clause contained in the contract, that it lacked jurisdiction to consider a claim of human rights violations as an 'independent cause of action'.⁸³⁹ In this case, the clause limited the tribunal's jurisdiction to disputes 'in respect of an approved enterprise'.⁸⁴⁰ Nevertheless, it should be noted that '[i]f and to the extent that the human rights

⁸³⁴ Stephan W Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' in Armin Von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (Springer 2012), p. 135.

⁸³⁵ In this sense, see, *inter alia*, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009), paragraph 3.

⁸³⁶ *Idem*, paragraph 6.

⁸³⁷ Stephan W Schill (2012), p. 139.

⁸³⁸ Ole Spiermann, 'Applicable Law' in Peter Muchlinski et al. (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), p. 90.

⁸³⁹ See *Biloune & Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (Oct. 27, 1989), 19 Y.B. Comm. Arb. 11 (1994), paragraph 203.

⁸⁴⁰ *Idem*, paragraph 188.

violation affects the investment, it will become a dispute ‘in respect of’ the investment and must hence be arbitrable.⁸⁴¹ It is unclear what defines a dispute ‘in respect of’ the investment, and much depends on the interpretation made by each investment tribunal.⁸⁴²

The mere affirmation of jurisdiction over an investment-related HRL issue is not in itself sufficient, as tribunals will still have to determine which substantive standards apply to the dispute. This depends on the applicable law clause which, in many IIAs, explicitly includes international law (covering treaties, customary international law and general principles of law) and host-State domestic law, which may lead the tribunal to apply relevant human rights norms to the facts of the dispute.⁸⁴³ Once again, much depends on interpretation – for instance, in *von Pezold v. Zimbabwe*, the tribunal affirmed that ‘reference to “such rules of general international law as may be applicable” in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs’.⁸⁴⁴

In addition to jurisdiction and applicable law clauses, there are other areas which may constitute entry points for human rights arguments – these will be analysed in the following section.

2. Entry points for human rights law in ISDS

There are a number of mechanisms that may be used in order to introduce HRL into ISDS. These include ways of denying treaty protection to the investor based on the illegality of the investor’s conduct, such as the ‘clean hands’ doctrine; the interpretation of the relevant IIA in conformity with HRL; application and interpretation of substantive standards; the determination of the *quantum* of compensation; and, finally, the possibility of counterclaims.

⁸⁴¹ Clara Reiner and Christoph Schreuer (2009), p. 84.

⁸⁴² In this sense, see Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 95.

⁸⁴³ In this sense, see Clara Reiner and Christoph Schreuer (2009), pp. 84-85.

⁸⁴⁴ *Bernhard von Pezold & Others v. Republic of Zimbabwe and Border Timbers Limited & Others v. Zimbabwe*, ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25 (joined), Procedural Order No. 2 (26 June 2012), paragraph 57.

2.1. Denial of treaty protections – the ‘clean hands’ doctrine

There are several cases in which host States, faced with ISDS, challenged the legality of the investment, either for purposes of exclusion of jurisdiction or for the actual denial of treaty protections. The most important doctrine in this regard is the ‘clean hands’ doctrine (‘he who comes into equity must come with clean hands’). It stems from Roman law principles such as *ex delicto non oritur actio* (‘an unlawful act cannot serve as the basis of an action at law’) and *ex turpicausa non oritur* (‘an action cannot arise from a dishonourable cause’)⁸⁴⁵ and it means that ‘[i]f some form of illegal or improper conduct is found on the part of the investor, his or her hands will be “unclean”, his claims will be barred and any loss suffered will lie where it falls.’⁸⁴⁶ This doctrine is present in both civil and common law systems and has historically been used at the international level by a number of early international claims commissions.⁸⁴⁷ The usefulness of this principle, at least in theory, resides in the possibility of denying investment protection to investors who acted illegally, for instance, by violating the cultural rights of stakeholders. However, there is still a high level of uncertainty regarding the existence and implications of this doctrine in international law.⁸⁴⁸

There has been increasing support for the application of the ‘clean hands’ doctrine in IIL by a number of scholars.⁸⁴⁹ Even though most IIAs do not specifically provide for investor obligations, several of them have included a requirement that investments be made ‘in accordance with the law’ – and, even when this provision is not present, there is arguably an implicit legality requirement that can be derived from general principles of law.⁸⁵⁰ Whilst the explicit presence of such requirement may impact ISDS at the level of jurisdiction, the implicit legality requirement may affect the admissibility of a claim.⁸⁵¹

⁸⁴⁵ Patrick Dumberry, ‘State of Confusion: The Doctrine of ‘Clean Hands’ in Investment Arbitration After the Yukos Award’, 17 The Journal of World Investment & Trade 229 (2016), p. 230.

⁸⁴⁶ Aloysius Llamzon, ‘The State of the “Unclean Hands” Doctrine in International Investment Law: Yukos as both Omega and Alpha’, 30 ICSID Review 315 (2015), p. 316.

⁸⁴⁷ *Idem*, pp. 316-317.

⁸⁴⁸ Andrew Newcombe and Jean-Michel Marcoux, ‘Hesham Talaat M. Al-Warraq v Republic of Indonesia - Imposing International Obligations on Foreign Investors’, 30 ICSID Review 525 (2015), p. 530.

⁸⁴⁹ Patrick Dumberry (2016), p. 232.

⁸⁵⁰ Rahim Moloo and Alex Khachaturian, ‘The Compliance with the Law Requirement in International Investment Law’, 34 Fordham International Law Journal 1473 (2011), p. 1475.

⁸⁵¹ *Ibidem*; see also R Moloo et al., ‘Fraud and Corruption in International Arbitration’, 10 Transnational Dispute Management (TDM) (2013), p. 720.

In cases where the IIA contains a legality requirement, only investments made in accordance with the law will be protected. Consequently, 'if evidence that the investment at issue was not made legally comes to light, a tribunal will not have jurisdiction to resolve the dispute pertaining to that investment.'⁸⁵² Several tribunals have adopted this position in the past, such as in *Inceysa v. El Salvador*, in which it was found that 'without any doubt, (...) the will of the parties to the BIT was to exclude from the scope of application and protection of the Agreement disputes originating from investments which were not made in accordance with the laws of the host State.'⁸⁵³ The tribunal declined jurisdiction over the case, affirming that 'Inceysa cannot benefit from the rights granted in the BIT, including access to the jurisdiction of the Centre, because its investment does not meet the conditions of legality necessary to be included within the scope of that investment protection' and that 'the Centre does not have jurisdiction to hear the dispute brought before it, arising from the Contract executed between El Salvador and Inceysa, and the Arbitral Tribunal does not have competence to resolve these disputes.'⁸⁵⁴ Along the same lines, in *Fraport v. the Philippines*, 'the BIT explicitly and reiteratedly required that an investment, in order to qualify for BIT protection, had to be in accordance with the host state's law',⁸⁵⁵ and, consequently, '[b]ecause there is no "investment in accordance with law", the Tribunal lacks jurisdiction *ratione materiae*.'⁸⁵⁶

In cases where the relevant IIA does not contain a legality requirement, there is still the possibility of inferring that condition from general principles of law and thus excluding an investor claim as inadmissible. In fact, in *Plama v. Bulgaria*, the relevant IIA was the ECT, which does not contain an 'in accordance with law' provision; nevertheless, the tribunal still found that '[t]his does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.'⁸⁵⁷ It went on to affirm that:

In accordance with the introductory note to the ECT "[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues

⁸⁵² R Moloo et al. (2013), p. 722.

⁸⁵³ Cf. *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), paragraph 195.

⁸⁵⁴ *Idem*, paragraphs 335-337.

⁸⁵⁵ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/12S, Award (16 August 2007), paragraph 398.

⁸⁵⁶ *Idem*, paragraph 401.

⁸⁵⁷ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), paragraph 138.

[...]" *Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.*⁸⁵⁸

Very interestingly, the tribunal included in the concept of 'contrary to law' actions that go against both domestic law and international law.⁸⁵⁹ In the determination of which general principles of law had been violated by the investor, the tribunal relied in previous arbitral decisions referring to the principles of good faith, the 'principle of *nemo auditur propriam turpitudinem allegans* - that nobody can benefit from his own wrong' and the fact that 'recognizing the existence of rights arising from illegal acts would violate the "respect for the law" which is a principle of international public policy'.⁸⁶⁰ It decided that the fact that the investment was obtained by deceitful conduct rendered protecting the investor under the ECT 'contrary to the principle *nemo auditur propriam turpitudinem allegans*', contrary to 'the basic notion of international public policy' and contrary to the principle of good faith.⁸⁶¹ Consequently, the tribunal affirmed that it could not 'lend its support to Claimant's request and (...) therefore, grant the substantive protections of the ECT.'⁸⁶²

This approach was confirmed by several other cases, namely in *Phoenix Action, Ltd. v. The Czech Republic*, in which the tribunal affirmed:

*States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. (...) These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT.*⁸⁶³

Similarly, in *Hamester v Ghana*, the tribunal stated as follows:

⁸⁵⁸ *Idem*, paragraph 139 (references omitted).

⁸⁵⁹ *Idem*, paragraph 140.

⁸⁶⁰ *Idem*, paragraphs 141-142.

⁸⁶¹ *Idem*, paragraphs 143-144.

⁸⁶² *Idem*, paragraph 146.

⁸⁶³ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), paragraph 101.

*An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law. These are general principles that exist independently of specific language to this effect in the Treaty.*⁸⁶⁴

These cases, although not specifically mentioning the 'clean hands' doctrine, appear nevertheless to apply the principle by considering that illegal conduct by the investor may render his claim inadmissible. In that sense, the application of the legality requirement has been understood as a 'manifestation of the doctrine of clean hands'.⁸⁶⁵

Recent cases have, however, raised doubts about the application of the doctrine to ISDS: I refer specifically to the *Yukos* awards⁸⁶⁶ and to the case of *Hesham Talaat M. Al-Warraq v. Indonesia*.

The relevance of the *Yukos* awards lies not only in its treatment of the 'clean hands' doctrine and its enquiry into the characterization of the doctrine as a general principle of law, but also in the fact that it addressed 'the temporal scope of the legality requirement and the question as to whether or not it applies to violations committed by an investor during the post-establishment phase of its investment'.⁸⁶⁷ In February 2005, three controlling shareholders of OAO Yukos Oil Company (Hulley Enterprises Limited, a company organized under the laws of Cyprus; Yukos Universal Limited, a company organized under the laws of the Isle of Man; and Veteran Petroleum Limited, a company organized under the laws of Cyprus) initiated arbitrations against Russia under the ECT.

In these cases, Russia listed '28 instances of alleged "illegal and bad faith conduct" by Claimants or "attributable to" Claimants involving a variety of actors and spanning over ten years, from the privatization of Yukos in the mid-1990s to its liquidation in

⁸⁶⁴ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), paragraphs 123-124.

⁸⁶⁵ Patrick Dumberry (2016), pp. 234-237.

⁸⁶⁶ *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award (18 July 2014); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award (18 July 2014); and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award (18 July 2014).

⁸⁶⁷ Patrick Dumberry (2016), p. 231.

November 2007.⁸⁶⁸ Russia accused the investors of not paying their tax debts when they were due nor making reasonable settlement offers, dissipating the assets they held, lying to auditors, obstructing the work of bailiffs and sabotaging the auction of Yukos' core production subsidiary.⁸⁶⁹ Russia thus argued that the 'Claimants' "unclean hands" deprive the Tribunal of jurisdiction, render Claimants' claims inadmissible and/or deprive Claimants of the substantive protections of the ECT',⁸⁷⁰ and further stated that the 'clean hands' doctrine constituted a general principle of law.⁸⁷¹ Conversely, the investors argued that this doctrine should not apply to their claims, since: (1) the ECT did not provide for such principle; (2) it did not constitute a general principle of law; and (3) 'the instances of "unclean hands" alleged by Respondent are "collateral illegalities" that do not fall within the parameters of any "unclean hands" doctrine.'⁸⁷²

In turn, Russia argued that the absence of a legality requirement or of an explicit 'clean hands' provision in the ECT did not prevent the doctrine from applying, relying on a number of previous awards to consubstantiate this position.⁸⁷³ Contrarily, the investors argued that the awards cited by Russia constituted mere *obiter dicta*, since the relevant IIAs did contain a legality requirement.⁸⁷⁴ The tribunal affirmed:

The Tribunal notes that there is support in the decisions of tribunals in investment treaty arbitrations for the notion that, even where the applicable investment treaty does not contain an express requirement of compliance with host State laws (as is the case with the ECT), an investment that is made in breach of the laws of the host State may either: (a) not qualify as an investment, thus depriving the tribunal of jurisdiction; or (b) be refused the benefit of the substantive protections of the investment treaty.⁸⁷⁵

However, whilst Russia held that the legality requirement applied to investors' conduct in the post-establishment phase, the claimants argued that only the making

⁸⁶⁸ *Yukos v. Russia*, paragraph 1281.

⁸⁶⁹ *Idem*, paragraph 1310.

⁸⁷⁰ *Idem*, paragraph 1313.

⁸⁷¹ *Idem*, paragraph 1315.

⁸⁷² *Idem*, paragraph 1326.

⁸⁷³ *Idem*, paragraph 1314.

⁸⁷⁴ *Idem*, paragraphs 1328 and 1332.

⁸⁷⁵ *Idem*, paragraph 1349.

of an investment should be subject to a legality test.⁸⁷⁶ The tribunal agreed with the investor, stating:

*There is no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State in the course of its investment. If the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law, as the Russian Federation indeed purports to have done by reassessing taxes and imposing fines. However, if the investor believes these sanctions to be unjustified (as Claimants do in the present case), it must have the possibility of challenging their validity in accordance with the applicable investment treaty. It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.*⁸⁷⁷

The tribunal thus limited the scope of the legality requirement to the *making* of the investment, denying its applicability to the post-establishment phase. It should, however, be noted that the tribunal seemed to make a distinction between the legality requirement and the ‘clean hands’ doctrine, since it assessed the two points separately.⁸⁷⁸ As Dumbery correctly points out, this ‘suggests that any allegations of post-establishment breaches would have to be dealt with only under the clean hands doctrine.’⁸⁷⁹ Still, the Tribunal rejected the argument that the ‘clean hands’ doctrine constituted a general principle of law:

*The Tribunal is not persuaded that there exists a “general principle of law recognized by civilized nations” within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called “unclean hands.” General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an “unclean hands” principle in international law.*⁸⁸⁰

⁸⁷⁶ *Idem*, paragraphs 1316 and 1334.

⁸⁷⁷ *Idem*, paragraph 1355 (emphasis added).

⁸⁷⁸ *Idem*, paragraph 1357.

⁸⁷⁹ Patrick Dumbery (2016), p. 240.

⁸⁸⁰ *Yukos v. Russia*, paragraphs 1358-1359.

Nevertheless, it admitted that ‘some of the instances of Claimants’ “illegal and bad faith” conduct (...) could have an impact on the Tribunal’s assessment of liability and damages’,⁸⁸¹ and ended up reducing the amount of compensation by 25 percent.⁸⁸²

The case of *Hesham Talaat M. Al-Warraq v. Indonesia* is important and intriguing because it departs from the views expressed in the *Yukos* awards. In this case, the investor claimed he had been mistreated during criminal proceedings conducted by Indonesian authorities after a bank bailout. It is important to note that, unlike most IIAs, the applicable instrument, which was the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (OIC Agreement) contained an investor obligations clause, as follows:

*The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.*⁸⁸³

Indonesia emphasised the fact that this clause was different from normal legality requirements, for four reasons: first, the obligation to comply with host State law lies on the investor, and not on the investment; secondly, this obligation is not limited in temporal terms to the making of the investment, but it is rather on-going as long as the investor is operating in the host State; thirdly, the investor is not just expected to comply with national law, but also to refrain from disturbing public order or morals and from acting in a way that is prejudicial to public interest; lastly, the investor is also required to refrain from trying to achieve gains through unlawful means.⁸⁸⁴

The State further argued that Al-Warraq’s claim should be deemed inadmissible because the investor came to the proceedings with ‘unclean hands’.⁸⁸⁵ The tribunal agreed with Indonesia, stating:

The Tribunal concludes from the above that the Claimant failed to uphold the Indonesian laws and regulations. The Tribunal further considers that the

⁸⁸¹ *Idem*, paragraph 1374.

⁸⁸² *Idem*, paragraph 1827.

⁸⁸³ *Hesham Talaat M. Al-Warraq v. Indonesia*, paragraph 155.

⁸⁸⁴ *Idem*, paragraph 157.

⁸⁸⁵ *Idem*, paragraphs 161 and 172.

*Claimant's action, whether criminal or not, caused a liquidity issue to Bank Century, and his actions have been prejudicial to the public interest, in this case the Indonesian financial sector. The Claimant having breached the local laws and put the public interest at risk, he has deprived himself of the protection afforded by the OIC Agreement. In this regard, the Tribunal is of the view that the doctrine of "clean hands" renders the Claimant's claim inadmissible.*⁸⁸⁶

The tribunal thus affirmed that, even though the investor had not received FET, his violation of Article 9 of the OIC Agreement prevented him from pursuing his claim.⁸⁸⁷ Therefore, the tribunal refused to award damages for the FET violation⁸⁸⁸ and, because 'the Parties [had] argued their positions and filed their submissions diligently and in good faith throughout the proceedings',⁸⁸⁹ it decided that 'each party [should] bear its own legal expenses and costs, as well as the expenses and costs of the arbitration'.⁸⁹⁰

This decision clearly demonstrates that the presence of an investor obligations clause in the relevant IIA has the potential to dramatically affect the outcomes of ISDS and, furthermore, it clearly acknowledges the existence and applicability of the 'clean hands' doctrine. Although, in this case, the investor came with 'unclean hands' because of fraud, and not for the violation of human rights, it is possible to imagine situations in which the host State argues that the investor breached the investor obligations clause because of human rights abuses. However, as Cotula rightly points out, this would raise a number of other questions:

*[F]or example, what kind of evidence might a tribunal be prepared to consider in assessing alleged human rights abuses? What role, if any, might civil society play in providing that evidence, and through what channels? How would an investor obligations clause operate in cases where the claimant and the State were complicit in violating human rights?*⁸⁹¹

⁸⁸⁶ *Idem*, paragraphs 645-646 (emphasis added).

⁸⁸⁷ *Idem*, paragraph 648.

⁸⁸⁸ *Idem*, paragraph 654.

⁸⁸⁹ *Idem*, paragraph 681.

⁸⁹⁰ *Idem*, paragraph 682.

⁸⁹¹ Lorenzo Cotula, 'Human Rights and Investor Obligations in Investor-State Arbitration', 17 *The Journal of World Investment & Trade* 148 (2016), p. 156.

The analysis of these cases leads to the conclusion that the relevant case law is ‘confused and uncertain’.⁸⁹² The inconsistent approaches to the ‘clean hands’ doctrine do not allow for a clear anticipation of how tribunals might respond to similar claims in future cases, but it appears that States now have an additional tool to avoid liability for treaty breaches in case the investor engaged in human rights violations. It remains to be seen if States will have the right incentives to do so, and mostly how tribunals will react to this line of argumentation.

2.2. Treaty interpretation

One further point of entry for HRL is treaty interpretation. Arbitral tribunals have been criticised for their ‘disintegrative inclination’, i.e., their ‘tendency towards considering international investment law in a vacuum’.⁸⁹³ However, IIL does not exist in isolation; ‘[i]nternational law is a legal system, and investment treaties are creatures of it and governed by it.’⁸⁹⁴ Although this is not the place to analyse all the intricacies of treaty interpretation, some key pointers should be mentioned.

Usually, the choice of applicable law is made by the parties – therefore, if the parties explicitly refer to international HRL, it will be a part of the law applicable to the dispute. This possibility is, however, more theoretical than realistic.⁸⁹⁵ In the same vein, IIAs could, in theory, contain HRL provisions – but this ‘would be quite exceptional’.⁸⁹⁶ Nevertheless, external rules such as HRL may still be harmonised with IIL by arbitrators through treaty interpretation, more specifically, through systemic interpretation, as per the VCLT (which is deemed as reflecting customary rules of treaty interpretation).⁸⁹⁷ In this regard, the ILC, whilst dealing with the broader issue of fragmentation, affirmed that Article 31(3)(c) of the VCLT ‘may be taken to express what may be called the principle of “systemic integration”, the process (...) whereby

⁸⁹² Patrick Dumberry (2016), p. 259.

⁸⁹³ See Bruno Simma and Theodore Kill, ‘Harmonizing investment protection and international human rights: First steps towards a methodology’ in Christina Binder et al. (eds), *International investment law for the 21st century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009), p. 679.

⁸⁹⁴ Campbell McLachlan, ‘Investment treaties and general international law’, 57 *International and Comparative Law Quarterly* 361 (2008), p. 369.

⁸⁹⁵ *Idem*, p. 680.

⁸⁹⁶ Clara Reiner and Christoph Schreuer (2009), p. 84.

⁸⁹⁷ In this sense, Bruno Simma and Theodore Kill (2009), p. 691.

international obligations are interpreted by reference to their normative environment ("system").⁸⁹⁸ It added:

*All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any intrinsic priority against the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.*⁸⁹⁹

According to Article 31(3)(c) of the VCLT, the interpretation of treaties should take into account, together with the context, '[a]ny relevant rules of international law applicable in the relations between the parties.' These 'relevant rules' may clearly include international HRL, but the fundamental question is how the elements of this provision are assessed by arbitral tribunals. In fact, there are basically three elements to Article 31(3)(c) of the VCLT: first of all, the rule must in fact be a rule of international law; secondly, it must be 'relevant'; and thirdly, it must be applicable in the relations between the parties.

The first element may be clarified resorting to Article 38(1) of the ICJ Statute, which indicates that international law should be understood as comprising general customary law, treaties, and general principles.⁹⁰⁰ The element of relevance depends greatly on the interpretation of the term by adjudicators; in fact, 'relevant' 'is a relative term that lends itself to extremes of gradation and a substantive lack of clarity',⁹⁰¹ which means that arbitrators are given a significant amount of flexibility in this regard. The third element, demanding applicability in the relations between the parties, may be considered as referring to norms that are applicable in the relations between the parties, at the time the IIA was celebrated or at the time of interpretation, the latter

⁸⁹⁸ ILC, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' (Finalised by Martti Koskenniemi) UN Doc A/CN.4/L682, 13 April 2006, paragraph 413 (hereinafter, the ILC Report on Fragmentation).

⁸⁹⁹ *Idem*, paragraph 414.

⁹⁰⁰ Statute of the International Court of Justice, annexed to the Charter of the United Nations, available at: <http://www.icj-cij.org/documents/?p1=4&p2=2>.

⁹⁰¹ Bruno Simma and Theodore Kill (2009), p. 695.

appearing to be preferred in modern approaches.⁹⁰² In addition, it is usually understood as norms that are binding on the parties, although the term ‘applicable’ also allows room for interpretation.⁹⁰³ The concept of ‘parties’ should be understood as referring to the States parties to the IIA (as the investor will necessarily never be a party to international conventions, such as human rights instruments).⁹⁰⁴ Arguably, because all UN members have human rights obligations, IIAs celebrated by them should be interpreted in conformity with the relevant human rights norms.⁹⁰⁵

It should also be noted that, according to the ILC, systemic interpretation entails two presumptions: first, a positive one, that all matters not specifically resolved in a treaty should be governed by general principles of international law; and second, a negative one, that ‘in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States.’⁹⁰⁶ The latter is also known as the presumption of compliance with international law.

Recent decisions by investment tribunals have embraced the value of systemic interpretation. In *Tulip Real Estate v. Turkey*, the tribunal started by acknowledging that ‘[t]here is a widespread sentiment that the integration of the law of human rights into international investment law is an important concern.’⁹⁰⁷ It then referred to the VCLT and to the ILC Report on Fragmentation, as well as to previous decisions of arbitral tribunals regarding human rights. It then concluded that ‘resort to authorities stemming from the field of human rights (...) is a legitimate method of treaty interpretation.’⁹⁰⁸ In *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v. Argentina*, the tribunal significantly affirmed:

The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT’s special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of

⁹⁰² In this sense, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971), paragraph 53, which states: ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.’

⁹⁰³ In this sense, see Bruno Simma and Theodore Kill (2009), p. 697.

⁹⁰⁴ *Idem*, p. 700.

⁹⁰⁵ In this sense, Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 99.

⁹⁰⁶ ILC Report on Fragmentation, paragraph 465.

⁹⁰⁷ *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID/ARB/11/28, Decision on Annulment (30 December 2015), paragraph 86.

⁹⁰⁸ *Idem*, paragraph 92.

*international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.*⁹⁰⁹

It appears that concerns about the unification of international law and about the necessity of systemic interpretation are permeating into the world of investment arbitration, which is a very welcome tendency. This notwithstanding, systemic interpretation is still a source of difficulties; as Ascensio points out, the ‘integration [of systemic arguments] into the interpretative process may create more confusion than clarity, all the more so because there is no last resort adjudicative authority to combine them harmoniously.’⁹¹⁰ These difficulties should not, however, distract from the great potential of systemic interpretation, not only as an instrument to unify international law, but also as an important point of entry for human rights into ISDS.

Systemic interpretation is not the only interpretative tool that can lead to the consideration of HRL in ISDS. It is also crucial to take into account Article 31(1) and (2) of the VCLT and how the wording of the preamble may affect the interpretation of IIAs. According to these paragraphs, treaties should be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*.’⁹¹¹ The context is defined primarily by reference to the text of the treaty, including its preamble. If the preamble expressly refers to HRL, it may not establish binding obligations on the investors, but there is a possibility that tribunals interpreting the treaty provisions would take HRL into account. By the same token, if the preamble refers to sustainable development, rather than simply to development, there is a higher probability of tribunals paying deference to non-economic concerns in the context of investment – although this always entails significant flexibility for arbitrators.

2.3. Substantive standards

When tribunals interpret and apply substantive standards of protection contained in IIAs, they may do so by reference to HRL, especially in regard to the concepts of

⁹⁰⁹ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), paragraph 1200.

⁹¹⁰ Hervé Ascensio, ‘Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law’, 31 ICSID Review 366 (2016), p. 386.

⁹¹¹ Emphasis added.

expropriation,⁹¹² FET⁹¹³ and non-discrimination.⁹¹⁴ HRL could have a significant impact in the interpretation of substantive standards, namely by limiting the protection afforded to the investor (e.g., by considering the human rights purpose of an alleged expropriatory measure). A particularly relevant example of this possibility relates to the much-discussed notion of legitimate expectations, which can play an important role regarding virtually all protection standards.⁹¹⁵ Legitimate expectations may be defined so as to accommodate ‘the specific human rights situation of developing countries’,⁹¹⁶ and even of developed countries – this is particularly important regarding cultural rights, which are subject to progressive realisation. Arguably, investors cannot legitimately expect a State not to take measures to protect and promote human rights. Some authors further suggest that ‘[t]here can be no legitimate expectations that are contrary to human rights law’.⁹¹⁷

Another relevant example relates to the concept of expropriation. Whilst the ‘sole effect’ doctrine stipulates that the purpose of the State measure does not affect its expropriatory character,⁹¹⁸ another line of case-law does not consider a measure expropriatory if it is within the scope of the State’s police powers, a concept which arguably includes human rights⁹¹⁹ and is intimately connected with States’ right to regulate.⁹²⁰

A further possible and extremely relevant approach is that of applying to the matter of indirect expropriation a *proportionality balancing* test, as developed by international

⁹¹² See, *inter alia*, Jeff Waincymer, ‘Balancing Property Rights and Human Rights in Expropriation’ in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009).

⁹¹³ For a more detailed analysis, see, *inter alia*, Ioana Knoll-Tudor, ‘The Fair and Equitable Treatment Standard and Human Rights Norms’ in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009).

⁹¹⁴ See, *inter alia*, Federico Ortino, ‘Non-Discriminatory Treatment in Investment Disputes’ in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009).

⁹¹⁵ Ursula Kriebaum, ‘Human Rights of the Population of the Host State in International Investment Arbitration’, 10 J World Investment & Trade 653 (2009), p. 669.

⁹¹⁶ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 100.

⁹¹⁷ Ursula Kriebaum (2009), p. 669.

⁹¹⁸ See, *inter alia*, L Yves Fortier and Stephen L Drymer, ‘Indirect expropriation in the law of international investment: I know it when I see it, or caveat investor’, 19 ICSID Review 293 (2004), pp. 308 *et seq*; see also *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000), paragraphs 71-72.

⁹¹⁹ Ursula Kriebaum (2009), p. 669.

⁹²⁰ Jasper Krommendijk and John Morijn, ‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration’ in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009), p. 433.

human rights courts, chiefly the ECtHR.⁹²¹ For example, in *Tecmed v. Mexico*, the tribunal affirmed that '[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure'.⁹²² Subsequently, in *Azurix v. Argentina*, the tribunal referred to the *Tecmed* award and to the jurisprudence of the ECtHR on proportionality as 'additional elements [which] provide useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation'.⁹²³

Although there is no agreement as to the adequacy of proportionality for the balancing of investor protection and the regulatory interests of the host State,⁹²⁴ some authors affirm that the application of these tests to ISDS should be welcomed, particularly when considering that '[i]t allows for a more nuanced decision than the "sole effects" and the radical "police powers" doctrines'.⁹²⁵ Finally, it should be noted that arbitral tribunals often fail to clarify their approach to proportionality, or to engage meaningfully in a balancing exercise,⁹²⁶ and that the test is usually only applied to determine whether there was expropriation or not, rather than extending it to the quantification of compensation.⁹²⁷

2.4. Determination of the *quantum* of compensation

If a breach of an IIA is found, compensation should be paid to the investor; however, several factors may affect the determination of the *quantum* of such compensation. For example, in *Yukos v. Russia*, as seen above, the tribunal did not consider that the illegal conduct of the investor justified the denial of treaty protection; however, it did take it into account in the determination of the amount of compensation, which

⁹²¹ Pierre-Marie Dupuy and Jorge E Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress' in Marc Bungenberg et al. (eds), *International Investment Law* (Nomos/Hart 2015), section 3(a)(4).

⁹²² *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), paragraph 122.

⁹²³ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), paragraph 312.

⁹²⁴ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 102.

⁹²⁵ Ursula Kriebaum, 'Regulatory takings: balancing the interests of the investor and the state', 8 *The Journal of World Investment & Trade* 717 (2007), p. 729.

⁹²⁶ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 102.

⁹²⁷ Ursula Kriebaum, 'Regulatory takings: balancing the interests of the investor and the state' (2007), pp. 729 and 743-744; and Ursula Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration' (2009), p. 670.

was reduced by 25%.⁹²⁸ It is therefore important to ask whether a State measure adopted to comply with an international obligation (for the purpose of this research, either HRL or international cultural law) may have an impact on the determination of the amount of compensation or the choice of valuation methods.

The determination of the *quantum* of compensation is undoubtedly a stage of ISDS at which HRL may have another significant entry point. However, the most expressive examples of reduction of the amount of compensation for non-economic reasons are found in cases in which the host State raised cultural concerns based on international cultural law, rather than cases expressly argued in HRL terms.

A prominent example is found in *SPP v. Egypt*, which will be analysed in more detail in section 3. In this case, both the tribunal and the parties affirmed the relevance of the WHC for the dispute.⁹²⁹ The tribunal considered that the State measures at stake constituted a case of a compensable taking,⁹³⁰ but the acknowledgment of the international obligations held under the WHC had significant consequences on the determination of the amount of compensation. The tribunal affirmed that '[t]he cardinal point to be borne in mind, then, in determining the appropriate compensation is that, while the contracts could no longer be performed [due to the obligations assumed under the WHC], the Claimants are entitled to receive fair compensation for what was expropriated rather than damages for breach of contract.'⁹³¹ Although the investors argued that the discounted cash flow ('DCF') method should be applied, the tribunal disagreed and affirmed that this method was 'not appropriate for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation'.⁹³²

In addition, the tribunal decided that the loss of profit (*lucrum cessans*) could not be compensated, stating that 'the allowance of *lucrum cessans* may only involve those profits which are legitimate' and that 'lot sales in the areas registered with the World Heritage Committee under the UNESCO Convention would have been illegal under both international law and Egyptian law after 1979, when the registration was made.'⁹³³ It added that, because 'the project was located in an area where the

⁹²⁸ *Yukos v. Russia*, Final Award (18 July 2014), paragraphs 1633-1637.

⁹²⁹ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992), paragraph 78.

⁹³⁰ *Idem*, paragraph 154.

⁹³¹ *Idem*, paragraph 183.

⁹³² *Idem*, paragraph 188.

⁹³³ *Idem*, paragraph 190.

Claimants should have known there was a risk that antiquities would be discovered', it decided 'not to base compensation on profits that might have been earned after the Plateau areas were registered with UNESCO.'⁹³⁴

In the end, although the investors claimed a total of US\$41,000,000, the tribunal decided to award only US\$27,661,000,⁹³⁵ based on the difference between the expenditures undertaken to generate the revenues imputed to the lot sale and the portion of imputed revenues corresponding to the investor's shareholding in the joint venture.⁹³⁶ Because the tribunal denied the award of compensation for profits that could have been accrued after the emergence of the international cultural law obligation, this case is a clear example of 'how, under the specific circumstances of the case, international obligations arising from different subject-matter areas of international law can be relevant while adjudicating investment disputes.'⁹³⁷ There is no reason to assume that a HRL obligation could not trigger the same level of consideration.

2.5. Counterclaims

Finally, the possibility of tribunals hearing counterclaims by host States constitutes an important point of entry for HRL. The possibility of a respondent State to file a counterclaim against the claimant investor is a complicated issue (according to Asteriti, 'a Cinderella issue'),⁹³⁸ and this is not the place to discuss the complexities associated with the matter. However, a few general observations must be made so as to frame the issue.

First of all, it should be noted that the vast majority of the cases arbitrated so far were initiated by the investor,⁹³⁹ and the few counterclaims that have been submitted have

⁹³⁴ *Idem*, paragraph 251.

⁹³⁵ *Idem*, paragraph 257.

⁹³⁶ *Idem*, paragraph 217.

⁹³⁷ Lahra Liberti, 'The Relevance of Non-Investment Treaty Obligations in Assessing Compensation' in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009), p. 564.

⁹³⁸ Alessandra Asteriti, 'Environmental Law in Investment Arbitration: Procedural Means of Incorporation', 16 *The Journal of World Investment & Trade* 248 (2015), p. 256.

⁹³⁹ José Antonio Rivas, 'ICSID Treaty Counterclaims: Case Law and Treaty Evolution' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System - Journeys for the 21st Century* (Brill 2015), p. 779.

been unsuccessful in most cases.⁹⁴⁰ In addition, very few IIAs explicitly refer to counterclaims,⁹⁴¹ which means that the possibility of submitting a counterclaim highly depends on treaty interpretation. The rarity of investor obligations in treaty language leads to the fact that, in most cases, 'states cannot submit counterclaims against investors when the substance of the dispute is a violation of an IIA.'⁹⁴²

In principle, tribunals have jurisdiction over counterclaims, except if this is explicitly rejected; the viability of counterclaims depends in practice on the rules governing the proceedings and on the wording of the IIA provision establishing jurisdiction.⁹⁴³ Both Article 46 of the ICSID Convention and Article 21(3) of the UNCITRAL Arbitration Rules explicitly provide for counterclaims. However, when assessing the possibility of submitting counterclaims, it is necessary, first and foremost, to interpret the jurisdictional clause, which, as mentioned before, may be drafted in broader or narrower terms, the latter making it more difficult to defend the possibility of a counterclaim. The fundamental elements of jurisdiction that need to be assessed are the consent of the parties and the connection between the original claim and the counterclaim.⁹⁴⁴ Choice of law provisions may also be relevant, to the extent that they refer to the host State's domestic law – which would allow States to invoke investor obligations even in the absence of such obligations in the IIA.⁹⁴⁵ A detailed analysis of the controversies regarding each of these issues will not be undertaken in this research, for reasons of space.⁹⁴⁶

A recent award, in the case of *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v. Argentina*, is particularly relevant regarding counterclaims based on human rights. In this case, the dispute related to a concession for water and sewage services to be provided in the Province of Greater Buenos Aires. This concession was granted in early 2000 to Aguas Del Gran Buenos Aires S.A. (AGBA), a company established by foreign investors and shareholders, including Urbaser and CABB, and was terminated in July 2006. The investors claimed that Argentina breached several provisions of the

⁹⁴⁰ Thomas Kendra, 'State Counterclaims in Investment Arbitration-A New Lease of Life?', 29 *Arbitration International* 575 (2013), p. 580; see also Ana Vohryzek-Griest, 'State Counterclaims in Investor-State Disputes: A History of 30 Years of Failure' *International Law, Revista Colombiana de Derecho Internacional* 83 (2009).

⁹⁴¹ Andrea K Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law', 17 *Lewis & Clark L Rev* 461 (2013), p. 467.

⁹⁴² *Idem*, p. 463.

⁹⁴³ Alessandra Asteriti (2015), p. 257.

⁹⁴⁴ *Idem*, pp. 257-264.

⁹⁴⁵ Thomas Kendra (2013), p. 585.

⁹⁴⁶ For a more detailed discussion of the matter, see, *inter alia*, Andrea K Bjorklund (2013), pp. 473-475; see also Thomas Kendra (2013); Ana Vohryzek-Griest (2009); and Alessandra Asteriti (2015).

applicable BIT, including FET and expropriation claims. The tribunal dismissed all claims, except for finding a small breach of the FET standard in relation to the renegotiation of the concession contract between 2003 and 2005. More importantly for the purpose of this research, Argentina filed a counterclaim in the dispute, based on the damage suffered by the State as a result of the investors' administration of the concession, mainly due to the failure to make the investment they had undertaken to make, which constituted a violation of the principles of good faith and *pacta sunt servanda*, with impacts on the human right to water.⁹⁴⁷

The tribunal first accepted jurisdiction over Argentina's counterclaim, based mainly on Articles 25 and 46 of the ICSID Convention and on the broad wording of the BIT's dispute resolution clause, which was deemed 'completely neutral as to the identity of the claimant or respondent in an investment dispute arising "between the parties"'.⁹⁴⁸ The tribunal also rejected the investor's argument that its consent had been restricted to their involvement in the proceedings as claimants, to the exclusion of any potential counterclaim,⁹⁴⁹ asking:

*(...) when Claimants accept that Article X of the BIT retains a right for the Argentine Republic to raise a claim against the investor, how could it be possible to also admit that Claimants would be entitled to render this right nonexistent merely by restricting their acceptance of arbitration to their own claims?*⁹⁵⁰

The tribunal considered the filing of the counterclaim timely⁹⁵¹ and further affirmed that the factual link between the original claim and the counterclaim was 'manifest',⁹⁵² ultimately affirming that it had jurisdiction to deal with the counterclaim and that the claim was admissible.⁹⁵³

Although the tribunal ended up dismissing the counterclaim on its merits,⁹⁵⁴ several of its observations need to be noted. First of all, regarding the investors' argument that the BIT did not impose obligations on the investor, hence not granting any rights

⁹⁴⁷ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), paragraph 1156.

⁹⁴⁸ *Idem*, paragraph 1143.

⁹⁴⁹ *Idem*, paragraph 1123.

⁹⁵⁰ *Idem*, paragraph 1146.

⁹⁵¹ *Idem*, paragraph 1150.

⁹⁵² *Idem*, paragraph 1151.

⁹⁵³ *Idem*, paragraph 1155.

⁹⁵⁴ *Idem*, paragraph 1221.

to the host State, the tribunal affirmed that ‘(...) there [was] no provision stating that the investment’s host State would not have any right under the BIT’⁹⁵⁵ and that such understanding would be contrary to the wording of the BIT.⁹⁵⁶ In relation to the matter of applicable law, after making some comments on the need to preserve the *effet utile* of treaty rules,⁹⁵⁷ the tribunal affirmed that ‘the BIT does not represent, in the view of the Contracting Parties and its clear text, a set of rules defined in isolation without consideration given to rules of international law external to its own rules.’⁹⁵⁸

When assessing the relationship between the BIT and international and HRL, the tribunal stated that it felt ‘reluctant’ to accept the investors’ argument that private companies did not have human rights obligations.⁹⁵⁹ Regarding the principle according to which companies are by nature not able to be subjects of international law, and therefore not capable of holding obligations, the tribunal considered its importance to have been lost. It added that ‘[i]f the BIT (...) is not based on a corporation’s incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations.’⁹⁶⁰

After referring to CSR as ‘a standard of crucial importance’ accepted by international law, the tribunal meaningfully affirmed: ‘it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law.’⁹⁶¹ It further reviewed a number of human rights instruments, such as the UDHR, the ICESCR, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, as well as the Guiding Principles on Business and Human Rights, arriving at the following statement:

*(...) it is therefore to be admitted that the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.*⁹⁶²

⁹⁵⁵ *Idem*, paragraph 1183.

⁹⁵⁶ *Idem*, paragraph 1187.

⁹⁵⁷ *Idem*, paragraphs 1190-1191.

⁹⁵⁸ *Idem*, paragraph 1192.

⁹⁵⁹ *Idem*, paragraph 1193.

⁹⁶⁰ *Idem*, paragraph 1194.

⁹⁶¹ *Idem*, paragraph 1195.

⁹⁶² *Idem*, paragraph 1199 (emphasis added).

Nevertheless, after referring to the principle of systemic interpretation, the tribunal determined that the investors' obligation to make the investment they had undertaken to make did not find its ground in international law, but rather on domestic law. The contrary could only be possible if an obligation to abstain from violating human rights was at stake, but, in this case, that was 'not a matter for concern'.⁹⁶³

Even though the counterclaim failed, important progress has been made by this tribunal and, if the trend persists, it may contribute to a more regular and effective use of counterclaims as a mechanism to integrate HRL and international investment, with significant impact both on the equilibrium of ISDS and on the protection and promotion of human rights.

3. Avenues for the consideration of human rights in ISDS

In the previous section, several procedural points of entry for HRL were identified. With these possibilities in mind, it is now important to understand which actors may raise human rights arguments in arbitral proceedings, and how this has been happening in practice. There are essentially four possible avenues for the introduction of human rights arguments in ISDS: they may be raised by the investor, by States (mainly the host State), by third parties and by the tribunal itself.

3.1. Invocation of human rights and cultural arguments by investors

a) Human rights arguments

Situations where the investor invokes human rights in order to strengthen his claim are the less relevant in terms of the protection of stakeholders, but, perhaps not surprisingly, they constitute the area in which investment tribunals have shown the least reluctance to consider human rights arguments.⁹⁶⁴ It is thus important to still address these situations, simply because they allow for a deeper understanding of how investment tribunals actually deal with HRL.

⁹⁶³ *Idem*, paragraph 1210.

⁹⁶⁴ Jan Wouters and Nicolas Hachez (2009), p. 304.

Investors usually invoke human rights arguments either as an independent claim, in addition to claims regarding violation of the applicable IIA, or as way of substantiating the alleged violation of the applicable IIA.⁹⁶⁵ At first glance, this might appear counterintuitive, mainly for two reasons: first, arbitral tribunals that are constituted under an IIA are specialised courts with a limited mandate, restricted to ‘investment disputes’ brought by an ‘investor’, which means that HRL only has the chance to permeate into these disputes if the jurisdictional and applicable law clauses are broad enough to cover human rights issues;⁹⁶⁶ secondly, investment arbitrators are not human rights experts and may thus not be sufficiently competent to decide on this sort of issues.

There are, however, other incentives for investors to bring up human rights issues in investment disputes, the most obvious being the fact that a human rights argument can help support investment claims, thus strengthening the investor’s position. In addition, investors might prefer to raise these issues within the context of an investment dispute so as to avoid the adjudication rules of human rights bodies, namely the requirement of exhaustion of local remedies.⁹⁶⁷ Finally, it is important to consider the significantly different nature of the enforcement of the final decisions: ISDS awards are arguably much more easily enforced than the decisions of human rights adjudicating bodies and thus appear as an attractive alternative for investors.⁹⁶⁸

There has been a number of investment disputes where investors raised arguments that are directly grounded on HRL. The first that should be mentioned is the UNCITRAL case of *Biloune v. Ghana*,⁹⁶⁹ where a Syrian investor argued, in addition to the breach of contractual provisions in the form of expropriation, that there had been a violation of his human rights and denial of justice. In this case, the tribunal stated that investors are entitled to a minimum standard of treatment and that all individuals, regardless of nationality, hold inviolable human rights. Nevertheless, considering the wording of the consent clause contained in the agreement, the tribunal considered that it did not have jurisdiction to address this type of claim as an independent cause of action.⁹⁷⁰ The actions undertaken by Ghana that formed the

⁹⁶⁵ In this sense, see Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 72.

⁹⁶⁶ *Idem*, p. 73; see also section 2 above.

⁹⁶⁷ See Jan Wouters and Nicolas Hachez (2009), p. 308.

⁹⁶⁸ *Ibidem*.

⁹⁶⁹ *Biloune & Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (27 October 1989), 19 Y.B. Comm. Arb. 11 (1994).

⁹⁷⁰ Clara Reiner and Christoph Schreuer (2009), p. 84.

base of the human rights claim were, however, considered when deciding on the matter of expropriation. In the words of Kube and Petersmann, '[t]his may indicate that although the tribunal was reluctant to directly adjudicate on human rights, the fact that the governmental action had severe consequences for the individual could not be ignored (and was thus brought to bear in the determination of expropriation).'⁹⁷¹

Another interesting case in this regard is that of *Chevron v. Ecuador I*,⁹⁷² in which the investors made an independent claim for denial of justice under customary international law. The tribunal considered that it would have jurisdiction to assess these claims as long as they were sufficiently related to the investment, which, in this case, was considered to be true. The tribunal stated that the language of the IIA 'includes all disputes "arising out of or relating to" investment agreements and this language is broad enough to allow the Tribunal to hear a denial of justice claim relating to the Concession Agreements.'⁹⁷³ It is important to note that, in this case, the investors relied both on provisions of Ecuadorian domestic law and the international obligations stemming from the ACHR, as well as citing the jurisprudence of the European Court of Justice and the IACtHR.⁹⁷⁴ Stating that the IIA provision on denial of justice significantly overlapped with the prohibition of denial of justice under customary international law, the Tribunal considered that the relevant IIA provision, 'setting out an "effective means" standard, constitutes a *lex specialis* and not a mere restatement of the law on denial of justice.'⁹⁷⁵ The tribunal further stated that, given the common origins of the two standards, the application and interpretation of the treaty provision should be informed by the customary international law on denial of justice.⁹⁷⁶ As Kube and Petersmann point out, it is impossible to establish to what extent the human rights argument affected the final award, since '[t]he tribunal avoided explicit reference to international law in the subsequent analysis and to the human rights citations of the claimants.'⁹⁷⁷

⁹⁷¹ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 73.

⁹⁷² *Chevron Corporation (U.S.) & Texaco Petroleum Corporation (U.S.) v. Republic of Ecuador*, PCA Case No. 34877, Interim Award (1 December 2008).

⁹⁷³ *Idem*, paragraph 209.

⁹⁷⁴ *Chevron Corporation (U.S.) & Texaco Petroleum Corporation (U.S.) v. Republic of Ecuador*, PCA Case No. 34877, Partial Award on the Merits (30 March 2010), paragraphs 166 and 170.

⁹⁷⁵ *Idem*, paragraph 242.

⁹⁷⁶ *Idem*, paragraph 244.

⁹⁷⁷ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 74.

In *Toto v. Lebanon*,⁹⁷⁸ the investor claimed that the ‘abnormally slow pace’ of proceedings before national courts constituted a case of denial of justice under international law,⁹⁷⁹ and referred both to the case-law of the ECtHR and to Article 14 of the ICCPR.⁹⁸⁰ Because of the way the relevant IIA was drafted, including international law both for jurisdiction and applicable law purposes, the tribunal decided to engage with the investor’s argumentation and referred to the ICCPR and to a decision of the ICCPR Commission.⁹⁸¹ In the end, the tribunal stated that it did not have jurisdiction under the IIA to decide on the claim due to lack of evidence.⁹⁸² The tribunal nevertheless seemed to be open to the idea of considering human rights arguments, at least in principle.⁹⁸³

In *Roussalis v. Romania*,⁹⁸⁴ the investor based his claims on several breaches of the applicable IIA, but also raised an issue regarding the right to property, under the First Additional Protocol to the ECHR.⁹⁸⁵ The tribunal, however, dismissed the application of the European Convention, stating:

*The Tribunal does not exclude the possibility that the international obligations of the Contracting States (...) could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights and its Additional Protocol No.1. But the issue is moot in the present case and does not require decision by the Tribunal, given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments referred above.*⁹⁸⁶

There are also several cases in which the investor raised human rights arguments as a way of supporting their treaty breach claims. As Kube and Petersmann highlight, however, in these cases ‘the impact of human rights argumentation very often

⁹⁷⁸ *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009).

⁹⁷⁹ *Idem*, paragraph 142.

⁹⁸⁰ *Idem*, paragraph 144.

⁹⁸¹ *Idem*, paragraphs 158-160.

⁹⁸² *Idem*, paragraph 168.

⁹⁸³ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 75.

⁹⁸⁴ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011).

⁹⁸⁵ *Idem*, paragraphs 111 et seq.

⁹⁸⁶ *Idem*, paragraph 312.

remains unclear since the need for an explicit decision at the jurisdictional stage often is unnecessary.⁹⁸⁷

The first case that should be mentioned in this regard is that of *Micula v. Romania*,⁹⁸⁸ a case that is considered to be a successful example of the application of the rules of interpretation provided by Article 31(3)(c) of the VCLT.⁹⁸⁹ In this case, the tribunal considered certain rules of international law as relevant to the arbitral proceedings, namely EU law and, more interestingly, Article 15 of the UDHR, by stating that '[i]n making its determination, the Tribunal will be mindful' of the latter provision.⁹⁹⁰ However, the tribunal did not return to this provision in its reasoning, which makes it unclear how HRL affected the outcome of the proceedings.

Another extremely interesting case is that of *Grand River Enterprise v. U.S.*,⁹⁹¹ in which the investors were indigenous peoples, members of the First Nations. In this case, the claimants argued that the applicable law went beyond NAFTA, including a number of international human rights instruments such as the IACHR, the UDHR, the UNDRIP and ILO Convention no. 169.⁹⁹² The investors also argued that the relevant NAFTA provisions should be interpreted taking into account fundamental human rights norms.⁹⁹³ In its reasoning, the tribunal mentioned 'the need to preserve the NAFTA Parties' "flexibility to safeguard the public welfare"',⁹⁹⁴ as well as the 'the obligation to "take into account" other rules of international law'. It also criticised the US authorities for not being 'at all sensitive to the particular rights and interests of the Claimants or the indigenous nations of which they are citizens, including those interests in maintaining and developing cross-border trade relations in accordance with longstanding traditions in promoting economic development opportunities for indigenous communities'.⁹⁹⁵ The tribunal also assessed the existence of a customary international law principle requiring governments to consult indigenous peoples, but concluded that, should such duty exist, it would be collectively held by the indigenous peoples concerned, and there was no compelling evidence in the case showing that

⁹⁸⁷ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 75.

⁹⁸⁸ *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008).

⁹⁸⁹ Hervé Ascensio (2016), p. 382.

⁹⁹⁰ *Ioan Micula et al. v. Romania*, paragraph 88.

⁹⁹¹ *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award (12 January 2011).

⁹⁹² *Idem*, paragraph 182.

⁹⁹³ *Idem*, paragraph 66.

⁹⁹⁴ *Idem*, paragraph 69.

⁹⁹⁵ *Idem*, paragraph 186.

the investor was the rightful representative of the First Nations.⁹⁹⁶ However, and according to Balcerzak, ‘the case shows that the scope of jurisdiction, even if it covers exclusively claims based on standards of protection included in a particular investment treaty, limits neither the applicable law nor the possible influence of human rights on the interpretation of the provisions of investment treaties.’⁹⁹⁷

In *UPS v. Canada*, the investor claimed that the host State allegedly undertook anti-competitive practices in the postal services market, but also that Canada was violating labour rights provided by the ILO, the International Bill of Human Rights and customary international law, by denying a right to collective bargaining to postal workers in rural areas. According to UPS, this was tantamount to a violation of the obligation to ensure minimum standard of treatment to foreign investors in accordance with international law, under NAFTA, since it distorted competition and lowered wages.⁹⁹⁸ The tribunal did not, however, respond to the human rights arguments raised by the investor or by third parties acting as *amicus curiae*.⁹⁹⁹

It should also be noted that, in the cases of *Quasar de Valores SICAV S.A. v. Russia*¹⁰⁰⁰ and *Veteran Petroleum v. Russia*,¹⁰⁰¹ both the host State and the investors raised human rights arguments, namely through the invocation of the jurisprudence of the ECtHR to support their claims regarding the right to property. In both cases, the tribunals stated that said jurisprudence was not binding on them, but considered nevertheless that ‘it is natural to examine [these decisions] in the light of many of the arguments made’ by the claimants.¹⁰⁰²

A further relevant case is *Rompetrol v. Romania*, where the investor claimed that the arrest, detention, criminal investigations and wire-tapping of its directors constituted State-sponsored harassment in breach of the BIT. To support this claim, the investor invoked due process rights under international law, namely Article 6 of the ECHR. The tribunal affirmed, first of all, that it is not competent to decide issues relating to

⁹⁹⁶ *Idem*, paragraphs 210-216.

⁹⁹⁷ Filip Balcerzak, ‘Jurisdiction of Tribunals in Investor–State Arbitration and the Issue of Human Rights’, 29 ICSID Review 216 (2014), p. 225.

⁹⁹⁸ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 77.

⁹⁹⁹ *United Parcel Services of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits (24 May 2007), paragraphs 185-187.

¹⁰⁰⁰ *Quasar de Valores SICAV S.A. et al. v. Russian Federation*, SCC Case No. 24/2007, Award (20 July 2012).

¹⁰⁰¹ *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award (18 July 2014).

¹⁰⁰² *Quasar de Valores SICAV S.A. v. Russia*, paragraph 24.

the application of the ECHR; secondly, that the relevant IIA was the governing law of the dispute; more interestingly, it left the door open for HRL, by stating:

*The category of materials for the assessment in particular of fair and equitable treatment is not a closed one, and may include, in appropriate circumstances, the consideration of common standards under other international regimes (including those in the area of human rights), if and to the extent that they throw useful light on the content of fair and equitable treatment in particular sets of factual circumstances; the examination is however very specific to the particular circumstances, and defies definition by any general rule.*¹⁰⁰³

Lastly, the case of *Hesham Talaat M. Al-Warraq v. Indonesia* raises a number of interesting questions both regarding the investor's and the host State's arguments. In this case, the investor claimed he had been mistreated in the course of criminal proceedings conducted by Indonesian authorities after a bank bailout. The claimant was not present in these proceedings, however, and was convicted *in absentia* and a part of his assets was confiscated. The applicable IIA was the OIC Agreement,¹⁰⁰⁴ which contained 'an unusual provision (...) protecting the "basic rights" of investors'.¹⁰⁰⁵ The investor substantiated his position with reference to Article 14 of the ICCPR, which would apply by virtue of Article 31(3)(c) of the VCLT.¹⁰⁰⁶ The tribunal stated that the expression 'basic rights' as used in the OIC Agreement referred to 'basic property rights', and not to the investor's civil and political rights.¹⁰⁰⁷ However, in a rare display of openness to HRL, the tribunal analysed several international instruments such as the General Comments of the HRC,¹⁰⁰⁸ regional human rights instruments and case-law,¹⁰⁰⁹ the UDHR¹⁰¹⁰ and the UN Guidelines on the Role of Prosecutors,¹⁰¹¹ in addition to the ICCPR.¹⁰¹² Cotula rightly affirms that 'the Tribunal took some important steps forwards in considering human rights in [ISDS]',¹⁰¹³ mainly for three reasons. First, whilst assessing the relevance of the

¹⁰⁰³ *The Rompetrol Group N.V.v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013), paragraph 172.

¹⁰⁰⁴ Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2399>.

¹⁰⁰⁵ Lorenzo Cotula (2016), p. 149.

¹⁰⁰⁶ *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014), paragraphs 177-178 (hereinafter, *Hesham Talaat M. Al-Warraq v. Indonesia*).

¹⁰⁰⁷ *Idem*, paragraphs 518-522.

¹⁰⁰⁸ *Idem*, paragraph 572.

¹⁰⁰⁹ *Idem*, paragraph 575.

¹⁰¹⁰ *Idem*, paragraph 576.

¹⁰¹¹ *Idem*, paragraph 577.

¹⁰¹² *Idem*, paragraphs 556 et seq.

¹⁰¹³ Lorenzo Cotula (2016), p. 152.

ICCPR for the alleged breach of FET, the tribunal unmistakably affirmed that international HRL imposes obligations on States, and that this is relevant for ISDS.¹⁰¹⁴ Secondly, the tribunal acknowledged the fact that the ICCPR is part of general international law.¹⁰¹⁵ Thirdly, not only did the tribunal make an in-depth analysis of the relevant human rights instruments, but it also relied heavily on international HRL to establish that there was a breach of FET by the host State. It appears that, as stated by Cotula, '[f]ollowing *Al-Warraq*, tribunals might feel less reluctant to engage with [international HRL] arguments.'¹⁰¹⁶

Considering the above, it appears that the investment tribunals' approach to human rights arguments raised by the investor has been inconsistent, ranging 'from taking them into account in determining a breach of investment law obligations, stating to be "mindful" or aware of the human rights at stake, to denying the tribunals' competence for examining human rights claims as such.'¹⁰¹⁷ However, recent developments show that it is possible to balance human rights and investment protection, and that in many cases these two areas of international law are 'mutually reinforcing'.¹⁰¹⁸

b) Cultural arguments

In addition to considering cases involving human rights argumentation, it is important, for the purposes of this research, to also mention an important case regarding indigenous cultural rights, *Grand River v. US*, already mentioned above. In this case, the investor was a company composed of indigenous peoples, dedicated to the manufacture and sale of tobacco products, which they considered 'a traditional trade of the Six Nations peoples in which they have engaged for centuries.'¹⁰¹⁹ The claimants argued that the NAFTA provisions on NT, MFN, minimum standard of treatment and expropriation had been breached, negatively impacting on their cultural rights. They claimed:

This arbitration is not about health protection or promotion. It is not about State rights to regulate in the interests of the public good. And it is not only about

¹⁰¹⁴ *Hesham Talaat M. Al-Warraq v. Indonesia*, paragraphs 556-562 and 621.

¹⁰¹⁵ *Idem*, paragraph 558.

¹⁰¹⁶ Lorenzo Cotula (2016), p. 154.

¹⁰¹⁷ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 79.

¹⁰¹⁸ Lorenzo Cotula (2016), p. 152.

¹⁰¹⁹ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Statement of Claimant's Claims Arising Directly out of the Adoption and Implementation of the Allocable Share Amendments (6 November 2006), p. 1.

*the anticompetitive measures being imposed at the behest of a few large companies in exchange for a share of their profits. This arbitration concerns and arises out of the Respondent's discrimination against a group of aboriginal investors, their traditions, businesses and livelihoods, and the expropriation of their markets, all in violation of their rights under international law.*¹⁰²⁰

The investor claimed that the US had a duty to consult with indigenous peoples before imposing a measure that is likely to affect them, and that this duty resulted from a number of international HRL instruments and customary international law.¹⁰²¹ In this respect, the tribunal considered that 'state legal officers acted less than optimally' and that 'First Nations or tribal governments (...) should have been included in these discussions.'¹⁰²² It added that '[i]t may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them'.¹⁰²³

The claimant also argued that the US requirement that tobacco companies should pay a contribution as compensation for the treatment of tobacco-related illnesses, which was contained in the Master Settlement Agreement negotiated between several states and tobacco companies, amounted to an indirect expropriation. In this agreement, the companies also agreed to 'extensive restrictions on advertising and other marketing practices, and to fund smoking prevention and cessation programs', which increased the price of cigarettes.¹⁰²⁴ The investor further claimed that it should be immune from state regulation for commercial activities involving cross-border trade at a significant scale under the Jay Treaty, which protected cross-border movement and trade among indigenous peoples in North America; on this point, the Tribunal affirmed that the claimant's argument relied 'on an interpretation of the Jay Treaty that is not plainly supported by the text or easily and readily derived from application of accepted rules of treaty interpretation'.¹⁰²⁵

¹⁰²⁰ *Ibidem*.

¹⁰²¹ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), paragraph 182.

¹⁰²² *Idem*, paragraph 185.

¹⁰²³ *Idem*, paragraph 210.

¹⁰²⁴ *Idem*, paragraphs 8-9.

¹⁰²⁵ *Idem*, paragraph 143.

Even though the tribunal paid consideration to the particular status of indigenous peoples, it rejected the expropriation claim because the investor's business remained profitable.¹⁰²⁶ It also addressed the issue of legitimate expectations; based on the fact that 'trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states', it stated that the investor 'could not reasonably have developed and relied on an expectation (...) that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation.'¹⁰²⁷

In *Grand River*, the tribunal has shown some deference to the particular status of indigenous peoples under international law, but it is important to keep in mind that arbitral tribunals have limited jurisdiction and cannot thus decide on matters such as the violation of indigenous peoples' rights. As Vadi points out, one of the most significant implications of this case lies in the fact that 'arbitral tribunals are open to consider non-investment concerns within international investment law while fully respecting their arbitral mandate which requires them to adjudicate only on possible breaches of international investment law.'¹⁰²⁸

3.2. Invocation of human rights and cultural arguments by the host State

a) Human rights arguments

Human rights have frequently been invoked by host States as a justification for measures that had the potential to be considered breaches of IIAs. As has been noted before, States may find themselves in a situation of conflict between observing its international obligations (States are subject to international human rights obligations, both not to engage in human rights violations and to prevent human rights violations undertaken by others) and complying with the commitments assumed through the

¹⁰²⁶ *Idem*, paragraphs 153-155.

¹⁰²⁷ *Idem*, paragraphs 144-145.

¹⁰²⁸ Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press 2014), p. 231.

conclusion of IIAs. This conflict may potentially constrict States' regulatory space, as liability for breaches of IIAs may incentivise a 'race-to-the-bottom'.¹⁰²⁹

It should be mentioned that there are no known cases to date brought by States against investors for violation of human rights.¹⁰³⁰ This could be due to procedural reasons, since only a small minority of IIAs allow for States to initiate proceedings; in addition, usually the investor expresses his consent to arbitration in his request to initiate proceedings, which may be limited to the substance of the request.¹⁰³¹ Furthermore, it is common to find a degree of complicity between the investor and the host State when it comes to human rights abuses. To complicate the situation further, the human rights obligations of non-State actors are still not defined in international law, which renders such claims more difficult.¹⁰³²

This section will thus focus on disputes where the host State raised human rights arguments as a defence against investor claims – more precisely, as a justification for measures taken in furtherance of international human rights obligations which adversely affect foreign investors or investments.

The first cases that should be mentioned are the ones brought against Argentina in relation to the right to water, a human right contained in the ICESCR and other human rights instruments.¹⁰³³ Argentina adopted a number of emergency measures as a reaction to the 1999 economic and financial crisis, namely to ensure that its population had access to affordable water and gas, and several investors contested said measures through ISDS. In *Azurix v. Argentina*, the State argued that 'a conflict between [an IIA] and human rights treaties must be resolved in favor of human rights because the consumers' public interest must prevail over the private interest of service provider [sic]'.¹⁰³⁴ The tribunal stated that the issue of incompatibility between the relevant IIA and human rights had not been 'fully argued' and that it failed 'to understand the incompatibility' in the specifics of the case, since the services to

¹⁰²⁹ OHCHR, Human rights, trade and investment report of the High Commissioner for Human Rights (E/CN.4/Sub.2/2003/9) (2003), p. 11.

¹⁰³⁰ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 80.

¹⁰³¹ Clara Reiner and Christoph Schreuer (2009), p. 89.

¹⁰³² *Ibidem*; nevertheless, a tribunal has already accepted that investors may hold rights and obligations under international law – see section 2.5. above.

¹⁰³³ Committee on Economic Social and Cultural Rights, 'General Comment No. 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (E/C.12/2002/11, 20 January 2003). See also, *inter alia*, Article 14(2)(h) of the CEDAW and Article 24(2)(c) of the CRC.

¹⁰³⁴ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), paragraph 254.

consumers kept being provided after the termination notice.¹⁰³⁵ Nevertheless, when the tribunal analysed the concept of public purpose to assess the existence of expropriation, it recognised that '[i]n the exercise of their public policy function, governments take all sorts of measures that may affect the economic value of investments without such measures giving rise to a need to compensate'¹⁰³⁶ and subsequently referred to the *Tecmed* award, in which the tribunal sought guidance in the case law of the ECtHR.¹⁰³⁷ However, there was no discussion of the impact of HRL in the determination of expropriation – a fact that some authors blame Argentina for.¹⁰³⁸

In *Siemens v. Argentina*, the reference to HRL by the State was deemed as not sufficiently developed, which led the tribunal to affirm that 'without the benefit of further elaboration and substantiation by the parties, [the human rights argument] is not an argument that, prima facie, bears any relationship to the merits of this case.'¹⁰³⁹ In *Suez/Vivendi v. Argentina*, the State, in addition to the argument of necessity, invoked the human right to water as a justification for its measures.¹⁰⁴⁰ The tribunal acknowledged that '[t]he provision of water and sewage services to the metropolitan area of Buenos Aires certainly was vital to the health and well-being of nearly ten million people and was therefore an essential interest of the Argentine State', but stated it was 'not convinced that the only way that Argentina could satisfy that essential interest was by adopting measures that would subsequently violate the treaty rights of the Claimants' investments to fair and equitable treatment'.¹⁰⁴¹ It added:

Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually

¹⁰³⁵ *Idem*, paragraph 261.

¹⁰³⁶ *Idem*, paragraph 310.

¹⁰³⁷ *Idem*, paragraph 11.

¹⁰³⁸ Ursula Kriebaum, 'Foreign Investments & Human Rights-The Actors and Their Different Roles', 10 Transnational Dispute Management (TDM) (2013), p. 6, stating that 'Argentina tried to invoke human rights as a defence, often in a half-hearted way'; see also Vivian Kube and Ernst-Ulrich Petersmann (2016), pp. 81-82.

¹⁰³⁹ *Siemens A. G. v. The Argentine Republic*, ICSID CASE No. ARB/02/8, Award (6 February 2007), paragraph 79.

¹⁰⁴⁰ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), paragraph 252.

¹⁰⁴¹ *Idem*, paragraph 260.

*exclusive. Thus, as discussed above, Argentina could have respected both types of obligations.*¹⁰⁴²

Kube and Petersmann rightly observe that it is difficult to understand how the tribunal reached the above conclusion of compatibility, since there is no in-depth analysis of Argentina's human rights obligations nor did the tribunal discuss the severity of the threat to the right to water that the State was trying to avoid and its impact on the investment obligations.¹⁰⁴³

In *SAUR v. Argentina*, the State again argued that its measures had been taken to protect the constitutionally grounded human right to water, adding that they could not be considered as an expropriation or deemed unfair, but should rather be seen as necessary and legitimate measures for the protection of its population and their fundamental rights.¹⁰⁴⁴ The tribunal acknowledged that human rights in general, and the right to water in particular, constituted one of the several sources that it should take into account in its decision, since these rights were a part of Argentine constitutional law and, more importantly, of the general principles of international law.¹⁰⁴⁵ However, it stated that these rights were not incompatible with the investor's rights under the relevant IIA.¹⁰⁴⁶

In other cases such as *Continental Casualty v. Argentina*, the State relied mainly on the 'necessity' clause contained in the relevant IIAs, which was analysed in light of Article XX of the GATT and customary international law.¹⁰⁴⁷ In this case, there was a general exception clause in Article XI of the US/Argentina BIT, which stated: '[t]his Treaty shall not preclude the application by either Party of measures *necessary* for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.' The main point in this decision was the fact that the tribunal 'adopted a mature form of proportionality analysis',¹⁰⁴⁸ even though it did not directly engage in a discussion of the conflict between IIA obligations and HRL.

¹⁰⁴² *Idem*, paragraph 262.

¹⁰⁴³ Vivian Kube and Ernst-Ulrich Petersmann (2016), pp. 82-83.

¹⁰⁴⁴ *SAUR International S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012), paragraph 328.

¹⁰⁴⁵ *Idem*, paragraph 330.

¹⁰⁴⁶ *Idem*, paragraph 331.

¹⁰⁴⁷ *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008), paragraphs 192-195.

¹⁰⁴⁸ Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier', 4 Law & Ethics of Human Rights 48 (2010), p. 73.

Nevertheless, 'the adoption of balancing methods from right-based constitutional law systems could promote convergence of human rights and international investment law.'¹⁰⁴⁹

Another significant case involving Argentina, this time in relation to the gas sector, is *CMS Gas v Argentina*, in which the State argued that 'as the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights.'¹⁰⁵⁰ The tribunal, however, affirmed that 'there is no question of affecting fundamental human rights when considering the issues disputed by the parties'.¹⁰⁵¹

It is also important to mention the case of *Biwater Gauff v Tanzania*, which concerned water privatisation. In this case, the tribunal summarised Tanzania's argument by stating that '[w]ater and sanitation services are vitally important, and the Republic has more than a right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so.'¹⁰⁵² The tribunal decided that Tanzania's measures amounted to an expropriation, but its reasoning did not reflect the human rights concerns expressed by the host State, rather focusing on the violation of contractual requirements.¹⁰⁵³

This overview of arbitral awards shows that States have had very little success in the invocation of HRL as a justification for measures that violate investment protections. As Kube and Petersmann note, 'ISDS tribunals are rather reluctant to accept human rights based arguments and have not developed a coherent methodology for evaluating the human rights dimensions of investment disputes. Host states [also] seem reluctant to justify their measures in terms of their human rights obligations.'¹⁰⁵⁴

b) Cultural arguments

After analysing several cases in which host States invoked human rights arguments as a defence, it is important to also mention some cases in which the protection of

¹⁰⁴⁹ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 84.

¹⁰⁵⁰ *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/08, Award (12 May 2005), paragraph 114.

¹⁰⁵¹ *Idem*, paragraph 121.

¹⁰⁵² *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), paragraph 434.

¹⁰⁵³ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 85.

¹⁰⁵⁴ *Idem*, p. 86.

cultural heritage was States' non-economic motivation for measures that could violate IIL. Even though these cases were not specifically framed in human rights terms, this research has already made clear that the right to culture includes the protection of cultural heritage. Because the interaction between cultural heritage and international investment has already been extensively covered in the relevant literature,¹⁰⁵⁵ and for reasons of space, only some key cases will be mentioned.

The first relevant case in this regard is *Glamis Gold v. USA*, which involved an area of the Californian desert considered sacred by the Quechan Indian tribe. The tribe vehemently opposed a project that entailed gold mining in the area, since it would allegedly 'destroy the Trail of Dreams',¹⁰⁵⁶ a sacred path walked by the Quechan in ceremonies 'to celebrate the creation of the world, the spirit world, the natural world, and [the Creator] *Kukumat's* cremation'.¹⁰⁵⁷ The investor initiated proceedings with the claim that certain measures taken by the federal government and by California regarding the backfilling of open-pit mines amounted to expropriation and to the violation of the minimum standard of treatment. In this case, the tribunal referred to UNESCO instruments regarding the protection of cultural heritage, namely the WHC.¹⁰⁵⁸ It found that the investor's claims were without merit, stating that the measure addressed 'some, if not all, of the harms caused to Native American sacred sites by open-pit mining' and that 'governments must compromise between the interests of competing parties'.¹⁰⁵⁹ It went on to say that 'there was a reasonable connection between the harm and the proposed remedy' and that the area contained 'sight lines, teaching areas and viewsheds that must be protected and would be harmed by significant pits and waste piles in the near vicinity'.¹⁰⁶⁰ In the end, the tribunal rejected all of the investor's claims and ordered him to pay two thirds of the arbitral costs.

In *Compañía del Desarrollo de Santa Elena v. Costa Rica*, the State expropriated the property of the investors to extend the Guanacaste Conservation Area, which was later entered into the World Heritage List. The tribunal recognised that States are allowed by international law to 'expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective

¹⁰⁵⁵ A detailed and in-depth analysis of these awards can be found in Valentina Vadi (2014).

¹⁰⁵⁶ *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009), paragraph 107.

¹⁰⁵⁷ *Idem*, paragraph 105.

¹⁰⁵⁸ *Idem*, paragraphs 83-84.

¹⁰⁵⁹ *Idem*, paragraph 804.

¹⁰⁶⁰ *Idem*, paragraph 805.

compensation', but affirmed that 'the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid (...) [and the] international source of the obligation to protect the environment makes no difference.'¹⁰⁶¹

The case of *SPP v. Egypt* concerned a tourism development project at the pyramids area near Cairo and at Ras El Hekma on the Mediterranean coast.¹⁰⁶² The project faced political opposition and became the subject of parliamentary inquiry, since it had the potential to threaten undiscovered antiquities.¹⁰⁶³ Egypt thus cancelled the project and declared the lands as having '*utilité publique*'¹⁰⁶⁴ and, around nine months later, nominated 'the pyramid fields from Giza to Dahshur' for inclusion in the World Heritage List.¹⁰⁶⁵ When determining the applicable law, the tribunal stated that there was no doubt that the WHC was relevant.¹⁰⁶⁶ The tribunal went on to find that certain acts of the Egyptian authorities 'created expectations protected by established principles of international law'¹⁰⁶⁷ and accepted the investor's argument that the public purpose of the expropriation did not exempt the State from paying compensation, affirming that the obligations of the WHC only became binding on Egypt after the nomination of the site.¹⁰⁶⁸ This has been the subject of criticism, with scholars arguing that 'the outstanding and universal value depends on the qualities of a site rather than on its evaluation either by the [S]tate party or the World Heritage Committee.'¹⁰⁶⁹ It should be noted, however, that even though the tribunal arrived at this conclusion, it did take into account the obligations arising from the WHC in the determination of the *quantum* of compensation, as seen in Section 2 above.

It is also important to mention the case of *Parkerings v. Lithuania*, which regarded the construction of parking facilities near the Cathedral in the Old Town of Vilnius, a World Heritage Site. In this case, the investor claimed that the State had breached the MFN clause when it terminated the agreement with *Parkerings* and signed a new contract

¹⁰⁶¹ *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000), paragraph 71.

¹⁰⁶² *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992), paragraph 43.

¹⁰⁶³ *Idem*, paragraph 62.

¹⁰⁶⁴ *Idem*, paragraph 65.

¹⁰⁶⁵ *Idem*, paragraph 153.

¹⁰⁶⁶ *Idem*, paragraph 78.

¹⁰⁶⁷ *Idem*, paragraph 83.

¹⁰⁶⁸ *Idem*, paragraph 154.

¹⁰⁶⁹ Valentina Vadi (2014), p. 122.

with a Dutch company,¹⁰⁷⁰ even though the latter would not conduct excavations under the Old Town.¹⁰⁷¹ The tribunal rejected this claim, stating that ‘the two investors were not *in like circumstances*’ and that ‘the City of Vilnius did have legitimate grounds to distinguish between the two projects’.¹⁰⁷² In this case, the tribunal showed deference towards the protection of cultural heritage and acknowledged that ‘[t]he historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project.’¹⁰⁷³ As Vadi points out, ‘[w]hile the Tribunal did not mention any hierarchy among different international law obligations, it concretely balanced the different norms.’¹⁰⁷⁴

In *Lemire v. Ukraine*, a case regarding intangible cultural heritage, the investor was the majority shareholder of Gala, a radio station broadcasting in Ukraine, and he initiated arbitration against the State on a number of grounds, including the violation of FET, minimum standard of treatment and performance requirements. Whilst other (domestic) investors managed to secure between 38 and 56 frequencies, Lemire was only awarded one, in a small village in rural Ukraine.¹⁰⁷⁵ Lemire argued that the fact that a tender for a radio channel required the broadcast to be in Ukrainian only amounted to discrimination and placed domestic investors in a position of advantage. He claimed that ‘[w]e should allow the audience to determine what it wants and we think that since Ukraine is seeking the status of a country with a market economy, it should not introduce Ukrainian culture by force’.¹⁰⁷⁶ The tribunal dismissed this claim, stating that the fact that the authorities had decided to establish said condition ‘was a legitimate decision, based on a public interest choice to extend the use of Ukrainian in the media’.¹⁰⁷⁷

As to the claim that the Ukrainian procedure for the issuance of broadcasting licences was in itself unfair, inequitable and discriminatory, the tribunal stated that ‘pluralism could arguably be better served if the new channel was awarded to a different company’¹⁰⁷⁸ and that ‘[t]he weaknesses in the Ukrainian legal procedure for the

¹⁰⁷⁰ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), paragraph 203.

¹⁰⁷¹ *Idem*, paragraph 284.

¹⁰⁷² *Idem*, paragraph 396.

¹⁰⁷³ *Idem*, paragraph 392.

¹⁰⁷⁴ Valentina Vadi (2014), p. 128.

¹⁰⁷⁵ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011), hereinafter ‘*Lemire v. Ukraine*, Award’, paragraph 59.

¹⁰⁷⁶ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), hereinafter ‘*Lemire v. Ukraine*, Decision on Jurisdiction and Liability’, paragraph 406.

¹⁰⁷⁷ *Idem*, paragraph 407.

¹⁰⁷⁸ *Idem*, paragraph 354.

issuance of radio frequencies and the lack of transparency in the administrative procedures resulted in an arbitrary advantage to local investors with greater political clout.¹⁰⁷⁹ As to the tender, the tribunal stated that ‘the apparently politically motivated preference for one competitor represents a discrimination against Claimant’ and that ‘such decisions violated the FET standard’.¹⁰⁸⁰

The investor further argued that the norm requiring that at least 50 percent of each radio station air time should be dedicated to music produced in Ukraine constituted the imposition of performance requirements, prohibited under the relevant IIA.¹⁰⁸¹ He complained that, because Gala was dedicated to hits, of which there were very few produced in Ukraine, this meant that it had to continuously replay the same few Ukrainian hits.¹⁰⁸² This allegedly led to a loss of advertising revenue.¹⁰⁸³ Ukraine, on the other hand, affirmed that:

In all jurisdictions, Radio and TV are special sectors subject to specific regulation. There are two reasons for this: first, radio frequencies are by technical nature scarce assets, and consequently the law must articulate systems for allocating licences to prospective bidders; but there is also a second reason: when regulating private activity in the media sector, States can, and frequently do, take into consideration a number of legitimate public policy issues; thus, media companies can be subject to specific regulation and supervision in order to guarantee transparency, political and linguistic pluralism, protection of children or minorities and other similar factors.¹⁰⁸⁴

In this respect, the tribunal acknowledged that the requirement applied to all broadcasters in Ukraine, independently of nationality.¹⁰⁸⁵ Very importantly, it added that:

As a sovereign State, Ukraine has the inherent right to regulate its affairs and adopt laws in order to protect the common good of its people, as defined by its Parliament and Government. The prerogative extends to promulgating regulations which define the State’s own cultural policy. The promotion of

¹⁰⁷⁹ *Lemire v. Ukraine*, Award, paragraph 64.

¹⁰⁸⁰ *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, paragraphs 356-357.

¹⁰⁸¹ *Idem*, paragraph 218 and 499.

¹⁰⁸² *Idem*, paragraph 503.

¹⁰⁸³ *Idem*, paragraph 499.

¹⁰⁸⁴ *Idem*, paragraph 241 (emphasis added).

¹⁰⁸⁵ *Idem*, paragraph 501.

*domestic music may validly reflect a State policy to preserve and strengthen cultural inheritance and national identity. The “high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders” is reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community.*¹⁰⁸⁶

The tribunal dismissed the investor’s claim, stating that the prohibition of performance requirements was ‘trade-related: to avoid that States impose local content requirements as a protection of local industries against competing imports’ and that ‘the underlying reasons [of the rule] were not to protect local industries and restrict imports, but rather to promote Ukraine’s cultural inheritance, a purpose which is compatible with [the IIA]’.¹⁰⁸⁷

This brief overview of cases allows for a number of conclusions to be drawn. First of all, it appears clear that there is no coherent response by arbitral tribunals to arguments connected to human rights or cultural heritage. Whilst tribunals have manifested a certain degree of deference for non-economic goals, there is still a high level of uncertainty regarding how much these arguments may impact the final decision. Vadi argues that ‘[a]rbitrators have increasingly taken cultural concerns into consideration in deciding cases brought before them (...) [and] the integration of cultural concerns within international investment arbitration is a welcome move because it contributes to the harmonious development of international law’.¹⁰⁸⁸ However, it should also be pointed out that tribunals are biased towards listed World Heritage, which ‘leaves much indigenous and rural heritage unprotected’.¹⁰⁸⁹ In my view, this bias could be overcome through an effective connection between cultural heritage and human rights, which would bridge the gap between listed and unlisted heritage, grounding cultural rights on human dignity and ensuring that all communities have access to the same level of protection.

¹⁰⁸⁶ *Idem*, paragraph 505 (emphasis added).

¹⁰⁸⁷ *Idem*, paragraph 510.

¹⁰⁸⁸ Valentina Vadi (2014), p. 131.

¹⁰⁸⁹ *Idem*, p. 132.

3.3. Invocation of human rights arguments by third parties

After assessing the first two avenues for human rights to enter ISDS, namely through the invocation of human rights arguments by investors and the host State, it is crucial to understand how third parties – specifically, affected stakeholders – may participate in ISDS and achieve the protection of their cultural rights.

One of the most prominent critiques of ISDS is based on the fact that the system does not guarantee enough transparency, legitimacy or accountability. This claim is grounded on the fact that issues of public policy are being decided through a system that is largely built on confidentiality and does not provide the level of public access that would ‘ensure public acceptance of the result and the democratic accountability of the process’.¹⁰⁹⁰ Furthermore, scholars have argued that ‘international investment arbitration has the potential to usurp national decision-making powers and even aspects of state sovereignty in areas of considerable public significance’¹⁰⁹¹ and that awards against the State are paid through taxpayers’ money,¹⁰⁹² which reinforces the idea that ISDS directly affects civil society in a way that commercial arbitration does not.

For these reasons, authors have begun to affirm that ‘[a]s investor-State disputes have evolved from the “traditional” expropriation cases (ie governmental interference with the physical assets of the foreign investors) to conflicts arising out of regulatory interferences with various aspects of the investment, it is increasingly recognized that they should be characterized as “regulatory disputes within the public law sphere”.’¹⁰⁹³

A trend is developing in the sense of opening the ISDS system to the participation and information of affected stakeholders. Third party intervention in arbitral proceedings is becoming more and more common, even if not universally guaranteed. The impetus for this development originated in the case law of the WTO dispute settlement bodies, which ‘started the trend and left the door wide open for

¹⁰⁹⁰ J Anthony VanDuzer, ‘*Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*’, 52 McGill Law Journal 681 (2007), p. 685.

¹⁰⁹¹ Eugenia Levine, ‘*Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*’, 29 Berkeley J Int’l L 200 (2011), p. 205.

¹⁰⁹² *Idem*, p. 206.

¹⁰⁹³ Tomoko Ishikawa, ‘*Third party participation in investment treaty arbitration*’, 59 International & Comparative Law Quarterly 373 (2010), p. 376; see also Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2008), p. 4.

private persons to file *amicus curiae* briefs in inter-State trade disputes'.¹⁰⁹⁴ Only later did it spread to ISDS.

a) The participation of non-disputing parties

As mentioned above, the acceptance of *amicus curiae* briefs in international law began at the WTO level,¹⁰⁹⁵ but, initially, arbitral tribunals did not match the WTO's openness to *amicus* participation. NAFTA tribunals were the first to accept such participation, and the first case in which a tribunal considered *amicus curiae* submissions was *Methanex*. This UNCITRAL case involved a Canadian company who claimed compensation from the US, arguing that its profits had been reduced due to California's ban on the use of a gas additive known as methyl tertiary-butyl ether (MTBE). Because environmental matters were at stake, several organisations dedicated to the subject petitioned the tribunal to request permission to make oral and written *amicus curiae* submissions, to participate in the arbitration proceedings as *amici curiae*, to attend the hearings, to be given the opportunity to review memorials of the parties and any other submissions or orders in the proceedings and to have observer status at oral hearings.

The parties had diverging opinions on the matter; whilst Mexico¹⁰⁹⁶ and the claimant¹⁰⁹⁷ opposed the admission of *amici curiae*, the US¹⁰⁹⁸ and Canada¹⁰⁹⁹ were in favour. The tribunal started by stating that 'there is nothing in either the UNCITRAL Arbitration Rules or Chapter 11, Section B, that either expressly confers upon the Tribunal the power to accept *amicus* submissions or expressly provides that the Tribunal shall have no such power'.¹¹⁰⁰ It then went on to affirm that such power should be considered against Article 15(1) of the UNCITRAL Arbitration Rules,¹¹⁰¹ which stated that 'the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at

¹⁰⁹⁴ Brigitte Stern, 'Civil Society's Voice in the Settlement of International Economic Disputes', 22 ICSID Review 280 (2007), p. 281.

¹⁰⁹⁵ For an analysis of how the approach to *amici curiae* evolved in the context of the WTO, see, *inter alia*, Brigitte Stern (2007), pp. 283-290.

¹⁰⁹⁶ *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae" (15 January 2001), paragraph 9.

¹⁰⁹⁷ *Idem*, paragraphs 11-15.

¹⁰⁹⁸ *Idem*, paragraph 16.

¹⁰⁹⁹ *Idem*, paragraph 10.

¹¹⁰⁰ *Idem*, paragraph 24.

¹¹⁰¹ *Idem*, paragraphs 25-26.

any stage in the proceedings each party is given a full opportunity of presenting its case'. The Tribunal interpreted this provision saying that 'it cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party.'¹¹⁰² However, it stated that receiving 'written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration.'¹¹⁰³

After referring to the previous practice of the Iran-US Claims Tribunal and the WTO,¹¹⁰⁴ the tribunal affirmed that it had 'the power to accept *amicus* submissions (in writing) from each of the Petitioners' but that it had 'no power to accept the Petitioners' requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration.'¹¹⁰⁵ The tribunal further admitted that there was 'undoubtedly public interest in this arbitration', arising from its subject-matter, that '[t]he substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties' and that Chapter 11 Arbitration 'could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.'¹¹⁰⁶ Finally, the tribunal declared that it had the power to accept *amicus* written submissions, subject to procedural limitations to be determined, and deferred the final decision to a later stage of the proceedings.¹¹⁰⁷

The above notwithstanding, the tribunal declined to allow *amici* to attend oral hearings, since Article 25(4) of the UNCITRAL Arbitration Rules required hearings to be held in camera unless both parties consent otherwise, and the claimant did not authorise such attendance.¹¹⁰⁸ As to access to the materials generated in the proceedings, the tribunal assessed the meaning of confidentiality in arbitration and distinguished it from privacy; however, it ended up rejecting *amici* access to such

¹¹⁰² *Idem*, paragraph 27.

¹¹⁰³ *Idem*, paragraph 30.

¹¹⁰⁴ *Idem*, paragraph 31 *et seq.*

¹¹⁰⁵ *Idem*, paragraph 47.

¹¹⁰⁶ *Idem*, paragraph 49.

¹¹⁰⁷ *Idem*, paragraph 53.

¹¹⁰⁸ *Idem*, paragraphs 41-42.

documents on the basis of the parties' agreement to keep the proceedings confidential.¹¹⁰⁹

In 2003, when this case was still ongoing, the NAFTA Free Trade Commission (FTC) issued the Statement of the FTC on non-disputing party participation, which acknowledged that non-disputing parties had the right to request permission to submit *amicus curiae* briefs, and established a number of procedural guidelines for the acceptance of such submissions.¹¹¹⁰ In 2004, following this statement, the *Methanex* tribunal decided to accept *amicus* submissions in accordance with the guidelines established therein.¹¹¹¹ The decision in *Methanex* was later followed by a number of decisions, namely in the *UPS* and *Glamis Gold* cases.¹¹¹²

Similarly to what happened in the context of NAFTA, ICSID tribunals dealing with the question of *amicus curiae* submissions for the first time were faced with the absence of specific rules governing the issue.¹¹¹³ The issue of *amicus* participation was first raised in the context of ICSID arbitration in the case of *Aguas del Tunari v. Bolivia*. The tribunal, however, denied such participation stating that it did not, 'absent the agreement of the Parties, have the power to: join a non-party to the proceedings; provide access to hearings to non-parties and, *a fortiori*, to the public generally; or to make the documents of the proceedings public.'¹¹¹⁴ Because the parties had not given such consent, it declined the petitioners' request. The matter was only clarified in April 2006, when the ICSID Arbitration Rules were amended so as to elucidate that tribunals do have the right to accept non-disputing party submissions.¹¹¹⁵

Whereas, before, tribunals had to decide 'with the consent of the parties', after this amendment they are only barred from allowing third parties to attend or observe the hearings if either party objects. This might be a very subtle change, but it does signal a wider openness to *amicus* participation. The first petition for *amicus curiae*

¹¹⁰⁹ *Idem*, paragraphs 43-46.

¹¹¹⁰ Statement of the Free Trade Commission on non-disputing party participation, available at: <http://www.state.gov/documents/organization/38791.pdf>.

¹¹¹¹ Cf. *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), paragraphs 26 *et seq.*

¹¹¹² Both cited above; for reasons of space, these cases will not be analysed in this section.

¹¹¹³ See Christina Knahr, 'Transparency, third party participation and access to documents in international investment arbitration', 23 *Arbitration International* 327 (2007), p. 334.

¹¹¹⁴ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Letter from President of Tribunal Responding to Petition (29 January 2003), available at: <http://ita.law.uvic.ca/documents/Aguas-BoliviaResponse.pdf>.

¹¹¹⁵ See, in particular, Rules 32 and 37 of the ICSID Arbitration Rules, available at: <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf>

submission to reach an ICSID tribunal after this amendment was in the context of the *Biwater Gauff v. Tanzania* case, a dispute which arose as a consequence of the termination of a contract between Biwater Gauff and Tanzania, regarding the service of water supply.¹¹¹⁶ Five NGOs filed a petition for *amicus* status and the tribunal applied and interpreted the new rules for the first time, ultimately deciding to accept written submissions from the petitioners.¹¹¹⁷ In addition, the tribunal decided to deny access to the documents filed by the parties, but left the door open for this access to be granted at a later stage of the proceedings.¹¹¹⁸

The third request made by the NGOs was that the hearings be open to the public and that non-disputing parties or *amici* be allowed to reply directly to any questions directed to them by the tribunal concerning their submissions. Because the claimant objected to this request, the tribunal found that it had ‘no power to permit the Petitioners’ presence or participation at the hearing’ and thus rejected the request. However, it reserved the right to ‘ask the Petitioners specific questions in relation to their written submission, and to request the filing of further written submissions and/or documents or other evidence, which might assist in better understanding the Petitioners’ position, whether before or after the hearing.’¹¹¹⁹

It is interesting to note that two of the NGOs petitioning in *Biwater* had already participated in *Methanex* and in one of the Argentinian water cases as *amici curiae*. This fact is all the more important since, as Stern points out, ‘[a] class of NGOs specializing in the formulation of *amicus curiae* briefs seems thus to be emerging.’¹¹²⁰ In addition, the trend towards greater acceptance of non-disputing party participation did not stop at the developments within NAFTA and ICSID disputes, and is rather becoming a more common feature of recent IIAs, such as the US FTAs with Singapore, Chile and Morocco.¹¹²¹

However, this trend does not appear to be irreversible, as evidenced by another case, *von Pezold v. Zimbabwe*, which concerned forestry and agricultural businesses in Zimbabwe that were subject to expropriation. In this case, an NGO and several

¹¹¹⁶ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 February 2007).

¹¹¹⁷ *Idem*, paragraphs 49-50.

¹¹¹⁸ *Idem*, paragraphs 66-68.

¹¹¹⁹ *Idem*, paragraphs 69-72.

¹¹²⁰ Brigitte Stern (2007), p. 327.

¹¹²¹ All available at: <https://ustr.gov/trade-agreements/free-trade-agreements>; see, in particular, Article 15.9(3) of the FTA with Singapore and Article 10.19(3) of the FTAs with Chile and Morocco.

indigenous communities requested to participate as *amici*, filing written submissions, accessing case materials, attending the oral hearings and answering questions posed by the tribunal. These requests were denied, based, among other reasons, on the widely contested¹¹²² belief that the petitioners were not 'independent' from the respondent State. The claimants had argued, among others, that the interests of the indigenous communities were adverse to their own and aligned with those of the State, and that these communities effectively constituted organs of the State and therefore could not be independent.¹¹²³ In an extremely restrictive interpretation, the tribunal affirmed that independence was implicit in Rule 37(2)(a) of the ICSID Arbitration Rules and decided to deny the application because of '[t]he apparent lack of independence or neutrality of the Petitioners'.¹¹²⁴

It is hard to understand such interpretation of Rule 37(2), which appears to conflict with the rationale of introducing the paragraph in the first place and also to contradict the requirement for a 'significant interest' in the proceedings. As Bastin observes, this decision 'constitutes not only a departure from previous case law and, arguably, from principle, but also a curtailment of the trend which had been previously evident in the investor-State arbitration system'.¹¹²⁵ The decision in *von Pezold v. Zimbabwe* should be seen as a reminder that the participation of *amici curiae* in ISDS is far from being guaranteed.

b) Human rights arguments in *amicus curiae* submissions

Several of the cases in which *amicus curiae* submissions were accepted were connected to human rights. As Kube and Petersmann point out, human rights argumentation put forth by third parties may have a double impact on ISDS: first, this kind of argumentation might weigh in the tribunal's assessment of whether to accept *amicus curiae* participation, since it is demonstrative of the existence of public interest; second, third-party participation may prompt the analysis of HRL within the context of investment arbitration.¹¹²⁶

¹¹²² See, *inter alia*, Lucas Bastin (2014), p. 139.

¹¹²³ *Idem*, paragraph 50.

¹¹²⁴ *Idem*, paragraph 56.

¹¹²⁵ *Idem*, p. 140.

¹¹²⁶ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 87.

A number of cases where third parties requested to participate as *amici curiae* raised human rights issues. First of all, in *Suez/Vivendi v. Argentina*, five NGOs filed a petition requesting: access to the hearings; participation as *amici curiae* and access to the case documents.¹¹²⁷ The claimants were of the opinion that such petition should be denied, whereas Argentina supported its acceptance.¹¹²⁸ Regarding the access to and participation in the hearings, the tribunal analysed the matter against ICSID Arbitration Rule 32(2), and, because the claimants had opposed the attendance of *amici*, the tribunal affirmed that '[t]he crucial element of consent by both parties to the dispute [was] absent in this case' and thus denied the corresponding part of the petition.¹¹²⁹

Regarding the submission of *amicus curiae* briefs, the tribunal started by stating that '[n]either the ICSID Convention nor the Arbitration Rules specifically authorize or specifically prohibit the submission by nonparties of *amicus curiae* briefs or other documents.'¹¹³⁰ The tribunal thus assessed whether it had the power to do so under Article 44 of the ICSID Convention, which provided that '[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question'. In its view, this sentence constituted 'a grant of residual power to the Tribunal to decide procedural questions not treated in the Convention itself or the rules applicable to a given dispute.'¹¹³¹ The tribunal compared this provision to Article 15(1) of the UNCITRAL Rules, which were deemed similar, and referred to the *Methanex* case, as well as to the practices of NAFTA, the Iran-US Claims Tribunal and the WTO, arriving at the conclusion that it did have 'the power to admit *amicus curiae* submissions from suitable nonparties in appropriate cases.'¹¹³² It further presented three basic criteria for the admission of *amicus curiae* briefs: 'a) the appropriateness of the subject matter of the case; b) the suitability of a given nonparty to act as *amicus curiae* in that case, and c) the procedure by which the *amicus* submission is made and considered.'¹¹³³

¹¹²⁷ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Order in response to a Petition for Participation as Amicus Curiae (19 May 2005), paragraph 1.

¹¹²⁸ *Idem*, paragraph 3.

¹¹²⁹ *Idem*, paragraphs 4-7.

¹¹³⁰ *Idem*, paragraph 9.

¹¹³¹ *Idem*, paragraph 10.

¹¹³² *Idem*, paragraph 16.

¹¹³³ *Idem*, paragraph 17.

As to the appropriateness of the subject-matter of the case, the tribunal acknowledged that it did ‘involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable nonparties.’¹¹³⁴ It also recognised that accepting *amicus* submissions would have ‘the additional desirable consequence of increasing the transparency of investor-state arbitration.’¹¹³⁵ The tribunal thus affirmed that this case was appropriate for *amicus curiae* participation.¹¹³⁶ Regarding the suitability of the petitioners to act as *amici curiae*, the tribunal required them to have ‘the expertise, experience, and independence to be of assistance in this case’; these requirements were to be assessed through the application for leave to make an *amicus* submission.¹¹³⁷

Because the tribunal considered that the disputing parties had provided sufficient information on jurisdictional issues, it declined to accept *amicus* participation on that matter.¹¹³⁸ In terms of the procedure for *amicus* briefs, the tribunal considered that it did not have to establish such procedure before the actual approval of the *amici*¹¹³⁹ and the matter was determined in a subsequent order.¹¹⁴⁰

In its decision on liability, the tribunal did not appear to consider the human rights argument sufficiently. The observations of the tribunal regarding the *amici* brief were restricted to a plain rejection of the idea that Argentina’s human rights obligations regarding the right to water trumped its obligations under the BITs. It affirmed that ‘Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. (...) Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus (...) Argentina could have respected both types of obligations’.¹¹⁴¹ Similarly, in *UPS v. Canada*, the tribunal acknowledged the human rights argument raised by the *amici* when summarising the procedural history¹¹⁴² but

¹¹³⁴ *Idem*, paragraph 20.

¹¹³⁵ *Idem*, paragraph 22.

¹¹³⁶ *Idem*, paragraph 23.

¹¹³⁷ *Idem*, paragraph 24.

¹¹³⁸ *Idem*, paragraph 28.

¹¹³⁹ *Idem*, paragraph 29.

¹¹⁴⁰ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an *amicus curiae* Submission (12 February 2007).

¹¹⁴¹ *Idem*, Decision on Liability (30 July 2010), paragraph 262.

¹¹⁴² *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 October 2001), paragraph 22; and Award on the Merits (24 May 2007), paragraph 3.

did not respond to it in the final award, simply dismissing the association of the minimum standard of treatment with the violation of workers' rights.¹¹⁴³

In *Glamis Gold*, *amicus curiae* submissions were filed by the Quechan Indian Nation, Friends of the Earth Canada/Friends of the Earth United States (joint submission), the National Mining Association and the Sierra Club/Earthworks (joint submission). The tribunal 'decided to accept each submission and consider it, as appropriate, in accordance with the principles stated in the FTC Statement'.¹¹⁴⁴ The most relevant submission for the purposes of this research is that of the Quechan Indian Nation, whose ancestral lands were being affected by the investment project, which meant they were directly implicated in the case. The applicants affirmed that 'the Tribe has proactively tracked all of the legal, administrative and policy initiatives known to it, to ensure that the sacred places at Indian Pass would be protected to the maximum extent possible and treated with appropriate dignity' and that 'the manner in which this sacred area and the Tribe's interest in it will be portrayed in this arbitral process is of great concern for native peoples worldwide, who are similarly attempting to protect their irreplaceable sacred places and ensure religious freedoms.' It added that it wanted 'to ensure that the sensitive and serious nature of indigenous sacred areas [would be] properly taken in account in this, and in all future, international proceedings'.¹¹⁴⁵

Amongst the Tribe's arguments, it was claimed that '[t]he Tribunal should accept the Tribe's submission because it will assist (...) in the determination of factual and legal issues by bringing the perspective, particular knowledge and insight that is unique to American tribal sovereign governments. Neither of the parties to these proceedings can make this kind of contribution' – namely, because 'as a sovereign nation, the Tribe cannot be said to be adequately represented by another sovereign: the United States Government'.¹¹⁴⁶ In addition, the Tribe stated that 'no party can speak with expertise or authority to the cultural, social or religious value of the Indian Pass area to the Tribe or the severity of impacts to the area and the Tribe, except for qualified members of the Tribe. The Tribe is thus uniquely positioned to comment on the impacts of the proposed mine to cultural resources, cultural landscape or context.'¹¹⁴⁷

¹¹⁴³ *Idem*, paragraphs 185-187.

¹¹⁴⁴ *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009), paragraph 286.

¹¹⁴⁵ *Glamis Gold*, Quechan Indian Nation Application for Leave to File a Non-Party Submission (19 August 2005), available at: <http://www.state.gov/documents/organization/52531.pdf>.

¹¹⁴⁶ *Ibidem*.

¹¹⁴⁷ *Ibidem*.

In 2005, the Tribunal accepted the Tribe's submission, without detailing any reasons.¹¹⁴⁸ The other petitioners were also granted *amici* status, as the tribunal held that 'it should apply strictly the requirements specified in the FTC Statement, for example restrictions as to length or limitations as to the matters to be addressed, but that, given the public and remedial purposes of non-disputing submissions, leave to file and acceptance of submissions should be granted liberally.'¹¹⁴⁹ In addition, 'the public was invited to view the proceedings in a separate room via closed circuit television. The Quechan were invited to view the proceedings from a different location with a separate video feed to allow their viewing of otherwise restricted discussion of cultural locations; tribal identification would be required for admission to this location.'¹¹⁵⁰

The Tribunal, however, emphasised the fact that, under the FTC Statement, 'acceptance of a non-disputing submission does not require the Tribunal to consider that submission at any point in the arbitration'¹¹⁵¹ and that

*inasmuch as the State Parties to the NAFTA have agreed to allow amicus filings in certain circumstances, it is the Tribunal's view that it should address those filings explicitly in its Award to the degree that they bear on decisions that must be taken. In this case, the Tribunal appreciates the thoughtful submissions made by a varied group of interested non-parties (...). Given the Tribunal's holdings, however, the Tribunal does not reach the particular issues addressed by these submissions.*¹¹⁵²

It should be noted that, in their submission, the Quechan Tribe invoked both human rights and cultural arguments, referring to Article 27 of the ICCPR and to several UNESCO documents.¹¹⁵³ However, the tribunal did not address such arguments specifically, or HRL in general, in its final award. It appears that, even though the Tribe was allowed a certain level of participation in the proceedings, their arguments were nonetheless largely ignored. For this reason, authors have suggested that

¹¹⁴⁸ *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation (16 September 2005).

¹¹⁴⁹ *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009), paragraph 286.

¹¹⁵⁰ *Idem*, paragraph 290.

¹¹⁵¹ *Idem*, paragraph 286.

¹¹⁵² *Idem*, paragraph 8.

¹¹⁵³ *Glamis Gold*, Submission of the Quechan Indian Nation (19 August 2005), p. 8, available at: <http://www.state.gov/documents/organization/52531.pdf>.

indigenous peoples should be granted the right to intervene in ISDS, rather than the mere right to file *amicus curiae* submissions.¹¹⁵⁴

In *Aguas del Tunari v. Argentina*, the petition requesting the participation as *amicus curiae* was rejected.¹¹⁵⁵ Both in *Suez/InterAguas v. Argentina* and *Biwater Gauff v. Tanzania*, the tribunal accepted the petition for participation as *amici*, based on the fact that the provision of water and sanitary systems could affect human rights.¹¹⁵⁶ However, in *Biwater*, the final award contains no reference whatsoever to human rights, except in the summary of the *amici*'s arguments; and, in *Suez/InterAguas*, the only reference to HRL is identical to the one in *Suez/Vivendi*.

In *Grand River v. USA*, the National Chief of the Assembly of First Nations submitted a letter supporting the claimants' position, raising human rights arguments.¹¹⁵⁷ This letter was later on included in the claimant's reply and the tribunal stated that it had been 'read and considered', with no further comments on its content.¹¹⁵⁸ In *von Pezold v. Zimbabwe*, the *amici* raised a number of human rights arguments, namely in relation to the rights of indigenous peoples, but, as mentioned above, their requests were denied.¹¹⁵⁹

It thus appears clear that, even though *amici* frequently raise human rights arguments in their submissions, the tribunals do not generally address those arguments sufficiently, and it remains unclear how they affect final decisions. However, it is also possible to observe that 'the review of the content of the *amicus* submission filed by NGOs, civil society organizations and human rights experts shows that third party intervention is a promising avenue for raising human rights concerns, especially for those which were otherwise not represented in the proceedings but nevertheless considerably affected by the investment dispute.'¹¹⁶⁰ Although 'a consistent and

¹¹⁵⁴ In this sense, see Patrick Wieland, 'Why the Amicus Curia Institution is Ill-Suited to Address Indigenous Peoples' Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention', 3 Trade, Law and Development 334 (2011).

¹¹⁵⁵ Cf. section 3.3(A).

¹¹⁵⁶ *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae* (17 March 2006), paragraph 18; and *Biwater Gauff v. Tanzania*, Procedural Order No. 5 (2 February 2007), paragraphs 52 and 55.

¹¹⁵⁷ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Amicus Curiae Submission of the Office of the National Chief of the Assembly of First Nations (19 January 2009).

¹¹⁵⁸ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), paragraph 60.

¹¹⁵⁹ See section 3.3(A).

¹¹⁶⁰ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 91.

transparent methodology'¹¹⁶¹ is still lacking, this avenue appears to be a promising one regarding the protection of the rights of stakeholders.

For the sake of completeness, it should be mentioned that the benefits of *amicus curiae* participation have already been widely analysed by many scholars, namely in terms of protection of the public interest, improvement of the quality of awards, enhanced transparency, facilitation of public scrutiny, increased legitimacy and mitigation of the public-private divide in ISDS.¹¹⁶² A number of negative impacts have also been identified, from the 'imposition' of the institution of *amicus curiae* on States that do not recognise it to an 'attack' on the consensual nature of arbitration. In addition, *amicus* participation has been characterised as an additional hurdle to the disputing parties, affecting their autonomy and strategies, compromising confidentiality, imposing costs and delays, and allegedly favouring States in detriment of the investors.¹¹⁶³

In addition, there are essentially four aspects in which *amicus curiae* participation shows considerable limitations, as identified by Obadia: first, an *amicus* is not an actual party to the dispute; second, the possibility of submitting *amicus* briefs is subject to approval based on the fulfilment of a number of requirements, rather than being automatic; third, the general rule of confidentiality blocks *amicus* access to case documentation; fourth, in the majority of cases, tribunals do not allow access to the hearings.¹¹⁶⁴

In light of the above, it is possible to conclude that, even though *amicus curiae* participation 'might contribute to the procedural legitimacy of the arbitral process, as well as to the substantive quality of the awards',¹¹⁶⁵ its role in practice has been relatively unsuccessful. Pessimists will affirm that *amicus* participation does not appear to have actually influenced the tribunals and their decisions, and that participation rights are far from being guaranteed.¹¹⁶⁶ A more nuanced view should be preferred, as expressed by Ortino: in spite of the seemingly tenuous link between *amici* briefs and the tribunals' decisions, 'the impact of civil society on international

¹¹⁶¹ *Ibidem*.

¹¹⁶² Tomoko Ishikawa (2010), p. 411.

¹¹⁶³ See Katia Fach Gómez, 'Rethinking the role of *amicus curiae* in international investment arbitration: how to draw the line favorably for the public interest', 35 Fordham Int'l LJ 510 (2011), pp. 543-554.

¹¹⁶⁴ Eloise Obadia, 'Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration', 22 ICSID Review 349 (2007), pp. 366 et seq.

¹¹⁶⁵ Eugenia Levine (2011), p. 217.

¹¹⁶⁶ In this sense, see Eloise Obadia (2007), p. 378 and Eugenia Levine (2011), p. 217.

economic law should be appreciated in a broader context'; the participation of *amici* effectively symbolizes 'the existence of apparently unrepresented stakeholders with a key interest in the outcome of the balancing exercise inherent in the application of international economic law'; and the acceptance of *amici* opens the door 'to a much broader, non-economic perspective' that cannot be ignored.¹¹⁶⁷

3.4. Invocation of human rights arguments by the Tribunal

After considering the invocation of human rights arguments by the investor, the State and by third parties, the missing piece of the puzzle is the introduction of such arguments by the Tribunal itself. There are several cases in which arbitral tribunals raised human rights issues without them being raised by any of the parties or by the *amici curiae*. One example can be found in *Azurix v. Argentina*, in which the tribunal relied on the case-law of the ECtHR in order to assess the expropriation claim.¹¹⁶⁸ In *Tecmed v. Mexico*, the tribunal equally referred to decisions of the ECtHR and of the IACtHR both in relation to the expropriation claim and to the relevance of the distinction between nationals and non-nationals.¹¹⁶⁹ In *Mondev v. USA*, the tribunal addressed the issue of the retrospective application of new rules by referring to the jurisprudence of the ECtHR;¹¹⁷⁰ when assessing the international jurisprudence regarding immunities of public authorities, it stated that the decisions of the ECtHR regarding the right to a court could provide guidance by analogy as to the possible scope of NAFTA's guarantee of 'treatment in accordance with international law, including fair and equitable treatment and full protection and security'.¹¹⁷¹ More interestingly, in *Phoenix v. Czech Republic*, the tribunal distinctively affirmed:

the ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in

¹¹⁶⁷ Federico Ortino, 'The Impact of Amicus Curiae Briefs in the Settlement of Trade and Investment Disputes: An Analysis of the Shrimp/Turtle and Methanex Decisions' (2009), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656844, p. 316.

¹¹⁶⁸ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), paragraph 311.

¹¹⁶⁹ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), paragraphs 116 and 122.

¹¹⁷⁰ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)99/02, Award (11 October 2002), paragraph 138.

¹¹⁷¹ *Idem*, paragraph 144.

*violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.*¹¹⁷²

These references, however, appear to be sporadic, with no clear methodology and usually only used for interpretative guidance. As a result, '[i]n light of the numerous dismissals of human rights arguments brought forward by *amici* and host states, this practice of sporadically referencing HRL and jurisprudence runs the risk of being perceived as selective, if not biased.'¹¹⁷³

4. Conclusions

In this chapter, I have attempted to assess if and how the cultural rights of affected stakeholders could be protected at the level of ISDS. The starting point of this analysis was the recognition of the perceived lack of legitimacy and bias of ISDS, largely resulting from the lack of transparency of the proceedings. However, it should be noted that there have been several efforts in the sense of increasing the levels of transparency and, consequently, the legitimacy of investment arbitration, namely through the formulation of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the conclusion of the UN Convention on Transparency in Treaty-based Investor-State Arbitration.¹¹⁷⁴

The first step of the analysis undertaken in this Chapter was to identify the procedural entry points for HRL in ISDS. Besides the obvious relevance of jurisdictional and applicable law issues, the most important mechanisms were identified and assessed, namely the denial of treaty protections based on the illegality of the investor's conduct and the 'clean hands' doctrine; the use of systemic interpretation of IIAs and the relevance of the wording of the preamble; the application and interpretation of substantive protection standards in conformity with HRL; the relevance of HRL in the determination of the *quantum* of compensation; and, finally, the possibility of host States filing counterclaims. This analysis demonstrated that progress is occurring on

¹¹⁷² *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), paragraph 78.

¹¹⁷³ Vivian Kube and Ernst-Ulrich Petersmann (2016), p. 93.

¹¹⁷⁴ In this regard, see, *inter alia*, Claudia Reith, 'The New UNCITRAL Rules on Transparency 2014 - Significant Breakthrough or a Regime Full of Empty Formula', 4 YB on Int'l Arb 121 (2015); and Esmé Shirlow, 'Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration', 31 ICSID Review 622 (2016).

many fronts and that the integration of international investment and HRL is happening more and more frequently.

The permeation of (cultural) human rights arguments into ISDS may occur via four different avenues, namely the invocation of such arguments by the investor himself, the host State, third parties or the tribunals *ex officio*. After analysing the relevant decisions, several conclusions stand out. First, there is a significant disconnection between human rights arguments and cultural heritage arguments, which compromises their strength. Cultural heritage arguments appear to have been increasingly well received by tribunals (perhaps more so than human rights arguments) but this has still been happening in an incoherent, disorganised and unpredictable way. In addition, the consideration of cultural concerns by tribunals has been biased towards listed World Heritage, which risks jeopardising much indigenous and rural heritage. As mentioned above, in my view, this bias could be overcome through an effective connection between cultural heritage and human rights, which would bridge the gap between listed and unlisted heritage, grounding cultural rights on human dignity and ensuring that all communities have access to the same level of protection.

Second, tribunals have shown more willingness to address human rights concerns when it comes to the assessment and enforcement of investor rights (even if quite inconsistently), as opposed to the rights of stakeholders, raised either by the host State or *amici curiae*. Third, tribunals appear to be much more open to the acceptance of human rights arguments in relation to procedural issues, methodology and as elements of procedural history. Both States and *amici curiae* have had very little success in the invocation of HRL as a justification for measures that violate investment protections, which confirms to a certain extent the perceived bias of ISDS in favour of investors.

In light of the above, it is possible to conclude that the integration of investment and human rights in ISDS is possible, is occurring and will likely keep taking place – even if, at least for now, ISDS is still not the most appropriate forum to ensure the protection and promotion of cultural rights. This is not only due to the empirical tendencies observed in this chapter, but also to the fact that arbitrators are not human rights experts and have a limited mandate – which, when exceeded, might result in the annulment of a decision. It is still crucial that tribunals develop a coherent and transparent methodology in this regard – simply because human rights issues are

bound to arise in investment disputes, and the *ex ante* mechanisms addressed in the previous chapters might not be sufficiently effective to guarantee the protection of cultural rights before a dispute has a chance to occur. It is thus possible to conclude, with Reiner and Schreuer, that '[t]he current trend seems to indicate that the role of human rights in investment arbitration will continue to increase. Whether the arbitral system is the best suited for dealing with breaches of human rights remains a controversial issue. Lack of transparency and legitimacy are perhaps inevitable reproaches and it remains to be seen whether these issues can be resolved.'¹¹⁷⁵

¹¹⁷⁵ Clara Reiner and Christoph Schreuer (2009), p. 96 (references omitted).

Conclusions

There are so many implications to the imbalance between IIL (and all the rights it grants to investors – in particular, to large and powerful MNEs) and the human rights of affected stakeholders (namely their cultural rights, which are underdeveloped and under-protected) that any effort to provide a clear picture of a fragment of that imbalance will necessarily spark thoughts and discussions connected to many adjacent issues. Cultural rights are already a kaleidoscope in and of itself, as I attempted to demonstrate in the first chapter of this thesis, and their interaction with other areas of international law, namely international economic law, may appear blurry at times, veiled by mentalities that still need to be changed. Proposals for more effective solutions to this imbalance have already appeared in many spheres, but still lack the political support (and perhaps level of human development) needed for implementation. Studying this discrepancy between the levels of protection of investors and stakeholders from the point of view of cultural rights is as much about correcting historical wrongs as it is about turning globalisation into a positive force, which is urgently needed.

International HRL, as it stands today, does not yet provide the clarity and accountability that are necessary to ensure sustainability and fairness. The need for a legally binding and comprehensive mechanism to impose obligations on MNEs is widely recognised, but still a long way from becoming a reality. There are already laudable efforts being made to achieve this, as can be seen from the activity of the HRC, which, through Resolution 26/9 of 14 July 2014, established ‘an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate [is] to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.¹¹⁷⁶ The

¹¹⁷⁶ HRC Resolution 26/9, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9 (14 July 2014).

viability of this legally binding instrument may however be questioned just by looking at the breakdown of the voting for this Resolution, which was adopted by a vote of 20 to 14, with 13 abstentions. The countries that opposed the adoption of the Resolution include the UK, the US and several other western countries (who, in my opinion, should be the first ones to push for its success). It makes us wonder whether this instrument will follow the route of the ill-fated 'Draft Norms'.¹¹⁷⁷ In addition, the process is slow – so far, the intergovernmental working group has met once a year, with the next session scheduled for October 2017.

Because of the lack of a legally binding instrument on the human rights responsibilities of MNEs, one has to consider other options. These can be soft law mechanisms imposing CSR on companies and financial institutions (as analysed in chapters 4 and 5) or different approaches to related hard law mechanisms (such as ISDS, as addressed in chapter 6). None of these options is fully satisfactory, but they do have the potential to effect change whilst a more effective solution is not in place. The downsides of these mechanisms have been assessed throughout Part II of this dissertation; in very broad terms, CSR alone is not sufficiently effective because of the lack of accountability and ISDS is arguably not the right forum to discuss human rights concerns, both for reasons of limited mandate and lack of transparency, as well as limited scope for the participation of stakeholders. But the possibilities that they provide are not negligible – on the contrary, they should be harnessed and put to good service.

It is crucial to ask, then: what can be done until a legally binding instrument comes to exist? How can the available tools be applied to the development of a fairer solution to the imbalance between the protection of investors and the protection of the cultural rights of stakeholders? There are essentially two possible paths: first, making the most of the instruments that are currently available; and, second, suggesting new solutions that require action by individual States and the international community as a whole.

¹¹⁷⁷ In this respect, see chapter 4.

1. Making the most of existing instruments

Using whatever tools are currently available to tackle the imbalance between the level of protection afforded to investors under IIL and the protection of individuals or communities affected by an investment has to be a priority, given the slow pace at which changes in international law usually occur. The first point that has to be made is connected with the importance of civil society, NGOs and activists in general. As demonstrated by the case of Standing Rock and the Dakota Access Pipeline, the more resistance there is to a project, the more likely it is that governments will pay heed to the concerns of stakeholders and that MNEs and banks will take measures to comply with CSR initiatives.¹¹⁷⁸ In addition, the involvement of civil society and NGOs is not restricted to pressure, but also plays an important role in ISDS, namely through the participation as *amici curiae*. This sounds like a completely evident observation, but civil society resistance to investment projects does not come without a price: it is sufficient to read the news about the Standing Rock protests to understand that protesters were met with use of excessive force, unlawful arrests, mistreatment in prisons and other difficulties.¹¹⁷⁹ As a result, communities trying to defend themselves from human rights abuses often end up encountering further human rights abuses. As unfair as this sounds, it is a reality that should not be ignored – it may very well reduce the incentives for resistance. Stakeholders should be legally empowered to voice their concerns without this kind of negative consequences.

The second important point regarding the available mechanisms is that CSR may not be sufficiently effective in and of itself, but it is a very important step forward and it constitutes a trend that civil society should reinforce. More importantly, it provides guidelines and plans of action that have the potential to inspire and frame future hard law instruments. In addition, it also appears clear that resolving conflicts with stakeholders through CSR mechanisms may be more effective than through ISDS, since it provides an opportunity to defend culture *ex ante*, i.e., before the damage is done. In this respect, both human rights impact assessments (with specific focus on

¹¹⁷⁸ However, it should be noted that the future of this project is still uncertain, mostly as a result of President Trump's recent decision to push the pipeline forward. In this regard, see, *inter alia*, The Guardian (26 January 2017), *Standing Rock Sioux tribe says Trump is breaking law with Dakota Access order*, available at: <https://www.theguardian.com/us-news/2017/jan/26/standing-rock-sioux-tribe-trump-breaking-law-dakota-access>.

¹¹⁷⁹ See, *inter alia*, The Guardian (31 October 2016), *Dakota Access pipeline protests: UN group investigates human rights abuses*, available at: <https://www.theguardian.com/us-news/2016/oct/31/dakota-access-pipeline-protest-investigation-human-rights-abuses>.

cultural rights) and FPIC play a crucial role. Companies and banks should comply with voluntary codes of conduct and commit to respecting and protecting cultural rights, and stakeholders should hold them accountable. One of the greatest difficulties regarding CSR is the lack of monitoring and accountability, and trusting the good intentions of powerful MNEs is probably naïve. Therefore, an effort should be made to expose non-compliant companies more effectively. And here we come back to the first point: the more information is held by the public, the more likely it is that companies and banks will feel compelled to make responsible investments.

The third point relates to how fragmented the cultural rights regime is at present. HRL and cultural law interact a lot less than they should, which compromises the strength of legal arguments. In the absence of a more integrated regime, stakeholders should make an effort to present a more inclusive line of argumentation, linking cultural rights to human dignity, cultural diversity and identity, tangible and intangible cultural heritage, the rights of minorities and indigenous peoples, self-determination and sustainable development. There are several international instruments devoted to each of these concepts, but only a holistic view of culture and cultural rights may provide a strong legal basis to face the protection of investors and investments that adversely affect individuals and communities.

Connected to this idea is the role of cultural rights in ISDS. Even though investment tribunals are arguably not the right forum to discuss human rights, for all the reasons put forth in chapter 6, it is inevitable to accept that human rights concerns in general, and cultural rights concerns in particular, may need to be brought to light by States and stakeholders acting as *amici curiae*, in order to protect States' sovereign prerogative to regulate in the public interest. For this to be possible, not only do tribunals need to pay more deference to international law in general as applicable law (thus reducing the 'isolationism' of IIL), but they also should consider that investors have certain obligations under national and international law, even if not explicitly provided by the relevant IIAs. This could either affect the *quantum* of compensation for regulatory takings or even deny treaty protection to investors who violate international law (specifically, cultural rights). In addition, both treaty interpretation in general and the application of protection standards in particular should be compatible with HRL. Another promising aspect of ISDS is the possibility of States filing counterclaims, in which they could arguably raise human rights arguments – tribunals need to be more flexible and more open to this possibility.

Because the consideration of human rights arguments by investment tribunals has been very limited, it appears clear again that, as mentioned above, stakeholders would benefit from substantiating their arguments with both HRL and cultural law considerations. In addition, the efforts being undertaken at the international level to increase the transparency of ISDS should be continued – not just to increase the chances for participation by civil society, but also to add legitimacy to investment arbitration.

2. Changing the landscape

There is much that can be done to change the landscape for stakeholders who are adversely affected by foreign investment. The most obvious and important one has already been mentioned: it would be ideal to clarify and ‘harden’ the law on the human rights responsibilities of MNEs. As previously observed, there have been attempts to do this in the past, but they have been largely unsuccessful; and there are praiseworthy initiatives taking place at the time of writing, even though their success is hard to predict. In a perfect world, both HRL and IIL would acknowledge that MNEs currently have as much (or indeed, more) power than some States and that their activities need to be regulated so as to avoid violations of human rights. Unquestionably, it is time for the law to address the impunity with which so many MNEs have been acting all around the world, for so many years.

Several strategies may also be adopted regarding drafting techniques for IIAs and investment contracts. These comprise the inclusion of investor obligations clauses, cultural and human rights exceptions and impact assessment requirements.¹¹⁸⁰ Much of what is wrong with IIL derives from the absence of investor obligations in IIAs – investors should be required to comply with both international and national law, and there should be consequences for situations where this compliance is lacking. Arbitral tribunals would have a much easier task should this type of clauses be inserted into IIAs more often; they also have the potential to foster an investment culture that emphasises prevention rather than remediation. In addition, a cultural human rights exception would allow States to preserve their regulatory space more effectively

¹¹⁸⁰ For several proposals for change, including the ones identified, see UNCTAD, *Investment Policy Framework for Sustainable Development* (UNCTAD/DIAE/PCB/2015/5), pp. 77-78 and 92 *et seq.*, available at: http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

without the fear of retaliation by investors. Impact assessments focusing not just on environmental concerns, but also on human rights and cultural aspects, would allow for a generally more responsible investment culture and, again, for a much deeper focus on prevention, rather than remediation. Even though several modern IIAs already contain provisions of this kind, they should become standard practice and they should be drafted in a clear way, so as to dissipate interpretative difficulties.

A further suggestion that needs to be made relates to the democratisation of both HRL and IIL. It is urgent to fight the tendency to focus on the culture of the majority, forgetting the delicate and vulnerable position of ethnic and racial minorities and indigenous peoples. Cultural diversity needs to be preserved, which means there should be a stronger effort to combat assimilation and homogenisation. This type of effort may come from the international community, but it has to be embraced by both home and host States alike.

Finally, I believe that the fragmentation of international law is a strong factor that facilitates the impunity of MNEs, their ability to forum shop and to circumvent HRL. Legal arguments become much stronger when they have a solid, uniform basis and when there are monitoring and accountability mechanisms at the international level. It is undeniable that many issues regarding the interaction of non-economic values and international economic law lead to the same type of concerns and solutions – I am thinking specifically about environmental concerns, which have arguably become much more developed in the context of both CSR and dispute settlement mechanisms. There are so many points of contact between human rights, cultural heritage, environmental protection and similar issues that one has to wonder if these could all be united under an overarching area of international law, possibly an ‘international sustainability law’. I believe that the more we compartmentalise non-economic values under international law, the weaker each of them becomes when considered in isolation. This type of comprehensiveness is clearly not an easy proposal, especially because of how hard and slow the process of change can be at the international level. Further research is also required in this regard, but it does seem to be a useful thought to consider.

3. Final Remarks

Defending the sacred is hard, especially when what is sacred to a community is unknown to the 'official' national culture or disregarded by States. It is also hard because of the imbalance between the power of affected stakeholders and the power of investors, who sometimes collude with States in actions that have the potential to harm cultural rights. In a world driven by economic and materialistic concerns, the first change that needs to happen is one of mentalities.

So much harm has already been inflicted on our planet and on the most sustainable communities that have lived in it for thousands of years that it is urgent to push for a change. This is already happening to a certain degree: NGOs and civil society are becoming more and more involved, more and more vocal, more and more demanding; ISDS is becoming more open to third party participation, more transparent and more legitimate; in addition, the international community is fighting for both hard and soft law mechanisms to impose human rights responsibilities on MNEs.

Alas, being on the right track does not mean that all is well, nor does it exempt academics and activists from questioning the *status quo* and pushing for more responsible investment. This research attempted to not only clarify the (confusing) conceptual framework surrounding cultural rights, but also to analyse their interaction with IIL. The starting point has been the wish to prevent harm rather than remediating it, even though it is unavoidable to address the situations in which harm has already been done. The focus on prevention had the logical consequence of assessing CSR as a tool before analysing the possibilities offered by ISDS; the focus on culture was the natural result of the realisation that cultural rights, although largely ignored and underdeveloped, are crucial to sustainable development, to the preservation of the identity of communities and to the promotion of peace amongst and within nations.

This research asked if, in order to integrate international investment and cultural rights, it was preferable to harness hard or soft law mechanisms, or a combination of both, and what could be done to improve the *status quo*. Throughout the assessment of the relevant instruments, I concluded that none of them individually was able to sufficiently guarantee such integration when taken in isolation. Consequently, I argued that it is essential to make an intelligent and effective use of both hard and soft law mechanisms in combination. Both sets of instruments should be pursued, but

they also need to be improved, as suggested above. Therefore, I conclude that the answer lies not in the strict choice between binding legislation and private orderings, but rather in their coexistence, mutual reinforcement and improvement.

International economic law is becoming more and more open to non-economic concerns, but this research demonstrated that current efforts only have limited success. The available mechanisms need to be 'hardened', deepened, considered with more seriousness. Globalisation is an unavoidable reality and foreign investment will not slow down, which means that it is urgent to develop solutions for the problems they may cause. It is everyone's responsibility to fight for change. Building on the foundations that have already been laid is essential, not just for the protection of present communities but also to guarantee a more sustainable, inclusive and humane future.

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